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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 256.

THE STATE OF MISSOURI AT THE RELATION AND TO THE USE OF THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ANDERSON W. HARRIS, GEORGE T. TODD, AND THOMAS MONTGOMERY, JUDGES OF THE COUNTY COURT OF SULLIVAN COUNTY, MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED OCTOBER 16, 1888.

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1 The United States of America to Anderson W. Harris, George T. Todd, and Thomas Montgomery, judges of the county court of Sullivan county, Missouri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The State of Missouri at the relation and to the use of the Quincy, Missouri and Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Elijah H. Norton, chief justice of the supreme court of the State of Missouri, this 28th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

E. H. NORTON, *Judge.*

2 [Endorsed:] Supreme court of Missouri. State of Missouri *ex rel.*, &c., *vs.* A. W. Harris *et al.* Citation. Filed July 11th, 1888. Henry W. Ewing, clerk, by Rowan Ray, D. C.

UNITED STATES OF AMERICA,
Central Division, Western District of Missouri, } *ss:*

I hereby acknowledge due service of the within citation this 30th day of June, A. D. 1888.

A. W. MULLINS,
Attorney for Defendant in Error.

3 UNITED STATES OF AMERICA, *ss:*

[Seal of the United States Circuit Court for the Western District of Missouri, Central Division.]

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the April term, 1888, thereof, between the State of Missouri at the relation and to the use of the Quincy, Missouri and Pacific Railroad Company, plaintiff, and Anderson W. Harris, George T. Todd, and Thomas Montgomery, judges of the county court of Sullivan county, Missouri, defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this 20th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by—
E. H. NORTON, *Judge.*

4 [Endorsed:] No. —. United States circuit court, western district of Missouri, central division. State of Missouri *ex rel.*, &c., *vs.* Anderson W. Harris *et al.* Writ of error to the supreme court of the State of Missouri. Filed 11th day of July, 1888. Henry W. Ewing, clerk, by Rowan Ray, D. C.

Return to Writ.

UNITED STATES OF AMERICA, *State of Missouri,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 22d day of September, A. D. 1888.

[Seal of the Supreme Court of Missouri.]

HENRY W. EWING, *Clerk,*
By ROWAN RAY, *D. C.*

5 In the Supreme Court of the United States, October Term, 1888.

THE STATE OF MISSOURI at the Relation and to the Use of THE Quincy, Missouri and Pacific Railroad Company, Plaintiff in Error,

against

ANDERSON W. HARRIS, GEORGE T. TODD, and THOMAS MONTGOMERY, Judges of the County Court of Sullivan County, Missouri, Defendants in Error.

Error to the supreme court of Missouri.

Assignment of Errors.

Now comes the relator and makes the following assignment of errors, viz:

1. The court below erroneously rendered judgment for the respondents when the same should have been for the relator, and therein the supreme court of Missouri erred in affirming said judgment.

2. The court below erroneously permitted the respondents to read in evidence, against the objections of the relator, the registration books used at the general election of 1868 and the subsequent special elections held in the year 1869 and 1870, and the supreme court of Missouri in that regard erred in affirming the said judgment.

6 3. A proper construction of section 14 of article XI of the constitution of Missouri of 1865, authorizing counties, cities, and towns to become stockholders in and to loan their credit to railroad and other companies and associations is that two-thirds of the qualified voters of such county, city, or town who may vote at a general or special election called for the purpose of determining the sense of the voters thereof shall assent thereto.

Wherefore the judgment of the court below, herein affirmed by the supreme court of Missouri, construing the aforesaid constitutional provision to require the affirmative vote of two-thirds of the entire number of persons appearing upon the registration lists as qualified voters, whether voting or not, is erroneous, in that such judgment impeaches, impairs, and invalidates the contract of subscription between the county and the relator company, and therein is in violation of and contrary to the provisions of section 10 of article I of the Constitution of the United States and violative of the relator's rights thereunder.

JNO. P. BUTLER,
Attorney for the Plaintiff in Error.

7 & 8 [Endorsed:] No. 4114. State *ex rel.* Q., M. & P. R. R. Co. *vs.* A. W. Harris *et al.* Filed July 11, 1888. H. W. Ewing, clerk, by Rowan Ray, D. C.

9 STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to wit, on the 23rd day of March, A. D. 1886, there was filed in the office of the clerk of the supreme court of the State of Missouri a transcript, which is in the words and figures as follows, to wit:

10 THE STATE OF MISSOURI, *ss:*

The State of Missouri to the judge of the eleventh judicial circuit in said State, Greeting:

Whereas in the record and proceedings in a certain cause lately pending in the Sullivan county circuit court, wherein The State of Missouri at the relation of the Quincy, Missouri and Pacific Railroad Company was plaintiff and A. W. Harris, George T. Todd, and Thomas Montgomery, judges of the county court of Sullivan county, were defendants in a civil action, manifest error hath intervened, to the great damage of the said plaintiff, as by its complaint we are informed:

Now we, being willing that the error, if any there be, should be corrected and full and speedy justice done to the parties aforesaid in that behalf, command you that you send to us, certified under your seal, the record and proceedings in the cause aforesaid as fully as the same remain of record before you in said court, so that we may have them before us at our supreme court, to be begun and held at the city of Jefferson, in the county of Cole, in said State, on the third Tuesday in April next, so that our judges of our supreme court, on inspecting the record and proceedings aforesaid, may cause to be further done therein for correcting the error what of right and according to law ought to be done; and have you then and there this writ.

Witness Henry W. Ewing, clerk of our said supreme court, at office, in the city of Jefferson, the 12th day of Novem-
[SEAL.] ber, in the year of our Lord one thousand eight hundred and eighty-five.

HENRY W. EWING, *Clerk.*
—— ——, *D. C.*

11 STATE OF MISSOURI, }
County of Sullivan, } *ss:*

I, H. T. McClanahan, clerk of the circuit court within and for the county aforesaid, in obedience to the mandate of the within writ, herewith transmit to the honorable supreme court of the State of Missouri a full, true, and complete transcript of the record and proceedings in the within-entitled cause as fully as the same remain of record in my office.

In testimony whereof I hereto set my hand and affix
[SEAL.] the seal of said court, at office, in the city of Milan, this 16th day of February, 1886.

H. T. McCLANAHAN, *Clerk.*

12 STATE OF MISSOURI, } ss:
County of Sullivan, }

Pleas before the circuit court of Sullivan county and State aforesaid on the — day of ——, 188—, before the Hon. Gavon D. Burgess, judge of the eleventh judicial circuit of the State of Missouri.

Order for Writ of Mandamus.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILWAY COMPANY, Relator,
against
ANDERSON W. HARRIS, THOMAS MONTGOMERY, and GEO. T. TODD, Judges of the Sullivan County Court, Respondent-.

Be it remembered that heretofore, to wit, on the 7th day of April, 1881, a petition was filed in the circuit court aforesaid in the above-entitled cause praying that an alternative writ of mandamus issue against the respondents because of the matters and things alleged in relator's petition. Whereupon the circuit court aforesaid made and caused to be entered of record an order of said court in words and figures following, to wit:

THE STATE OF MISSOURI at the Relation of THE QUINCY, MISSOURI & PACIFIC RAILROAD COMPANY, Pl'tiff,
against
A. W. HARRIS, THOMAS MONTGOMERY, and GEO. T. TODD, Judges of the County Court of Sullivan County, Missouri, Def'ts.

13 *Order Filing Petition for Mandamus.*

Now, at this day, comes the relator, by its attorney, Edward McCabe, and files herein its petition praying for an alternative writ of mandamus against said county judges, the above-named defendants, A. W. Harris, Thomas Montgomery, and George T. Todd, and which petition having been heard by the court, it is ordered by the court that said alternative writ of mandamus be issued and directed to the county court justices aforesaid, to wit, A. W. Harris, Thomas Montgomery, and George T. Todd, returnable to this court on the first day of the next regular term thereof, to be begun and held at the court-house, in the city of Milan, in said Sullivan county, Missouri, on Monday, the 21st day of November next, and then and there good cause show why such alternative writ of mandamus should not be made peremptory; and the said defendants to be served with a copy of this alternative writ of mandamus and the order of this court.

And thereupon and thereafter, viz., on the 10th day of August, 1881, a copy of said order of summons, together with a certified copy of the alternative writ of mandamus issued by the said court, was delivered to the sheriff of said county of Sullivan, which was returned executed on the 16th day of September, 1881.

And afterwards, to wit, at the May term, May 15th, 1882, an amended alternative writ of mandamus was issued in the said cause, which is in words and figures following, viz:

STATE OF MISSOURI, } ss:
Sullivan County, }

In the Circuit Court of Sullivan County, Missouri, May Term, 1882.

14 *Alternative Writ of Mandamus.*

The State of Missouri at the relation of the Quincy, Missouri and Pacific Railroad Company to Anderson W. Harris, Thomas Montgomery, and George T. Todd, judges of the county court of Sullivan county, Missouri:

Whereas it has been represented to the judge of this court, at Milan, in Sullivan county aforesaid, that on the 29th day of June, 1869, the Quincy, Missouri and Pacific Railroad Company was, ever since has been, and now is a corporation organized and existing under the general laws of the State of Missouri; that on the 22nd day of December, 1869, the relators, the said railroad company, was engaged in the work of constructing its line of railroad through the State of Missouri from a point on the Mississippi river opposite the city of Quincy, in the State of Illinois, in Marion county, Missouri, to a point on the Missouri river, in Atchison county, Missouri, opposite the city of Brownsville, Nebraska: and the said relator being desirous of constructing its road-bed through the county of Sullivan aforesaid, and the said county of Sullivan, in its municipal capacity, being desirous of assisting the relator in the prosecution and completion of said work, by way of subscribing to the capital stock of said railroad company, the county court of said Sullivan county, on the day last aforesaid, did order an election to be held at the usual and various voting places in said county as then established by law, on the 22nd day of February, 1870, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan would assent to a subscription in the sum of $200,000 to the capital stock of the relator, subject to the following conditions—that is to say, said railroad to be located and constructed through said
15 Sullivan county from east to west on a line as near through the center of said county as practicable, said subscription to be paid to said company, the relator, in the bonds of said county at par, said bonds to bear interest at the rate of seven per centum per annum, interest payable annually, to bear date the day of their issue, and to become due and payable 20 years after the date thereof, "provided that the county court of said county might at its election provide for and pay off ten per centum of the principal of said bonds each year after the elapse of ten years from the date of issue thereof, and might provide in said bonds for such payment of principal.

That whenever the relator, the said railroad company, should have surveyed and permanently located said road continuously through the State of Missouri from West Quincy, in Marion county,

in said State, to some point on the Missouri river opposite or near Brownsville, in the State of Nebraska, and should have continuously graded, bridged, and tied six miles of said railroad within Sullivan county aforesaid, upon the line then and thereafter designated, then the said county of Sullivan, by its county court aforesaid, would issue and deliver to the relator, the said railroad company, its bonds in payment of such subscription to the amount of $40,000, and for each additional section of six miles so continuously graded, bridged, and tied within said county of Sullivan said county would issue and deliver to the said relator an additional sum of $40,000 in the bonds of said county as aforesaid until the whole subscription of $200,000 should be paid up, provided that the last installment of said subscription of $200,000 should not be paid to the relator until the relator's railroad should be completely and continuously graded,
16 bridged, and tied from eastern boundary of said county to the western boundery of the same; and it being further ordered that at said special election to be held as aforesaid, and at the places aforesaid, all persons voting for such proposed subscription should have written or printed on their ballots "Shall Sullivan county, in the State of Missouri, subscribe $200,000 to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions and limitations provided in an order of the county court of said county made at its December term, 1869, entitled railroad order?" "Yes," and those voting against such subscription the words "Shall Sullivan county, in the State of Missouri, subscribe to the capital stock of the Quincy, Missouri and Pacific Railroad Company the sum of two hundred thousand dollars upon the stipulations, limitations, and conditions prescribed in the order of the county court of said county made at its December term, 1869, entitled railroad order?" "No."

And that it was further ordered that 20 days' notice of such special election should be given by the sheriff of said county of Sullivan by causing to be published a copy of said order (the same hereinabove recited) in the "Weekly North Missouri Herald," and by posting at least 3 copies of said recited order in each municipal township in said county of Sullivan 20 days prior to said election day, and that the clerk of the said county court was there ordered to furnish the sheriff of said county a copy of said election order, which was accordingly done by said clerk; that said notices was published in said newspaper in accordance with said order, and the said sheriff posted up and caused to be posted up in each municipal
township of said county, at least 20 days before the day on
17 which said election was to be held, at least 3 copies of said order by which the voters as aforesaid were authorized to vote on such proposition; that in pursuance of law then in force a special registration of the qualified voters of said county who had become such since the last general registration and subsequent special registrations of the qualified voters of said county prior thereto was had and held in the various municipal townships in said county prior to the holding of such special election; that said election was had and held at the time and at the places in the said

order and notices specified, and that the returns of said special election *was* made out and duly certified to the clerk of the county court of said county by the several judges and clerks of elections in various voting precincts of said county on the 23d day of February, 1870, and the said county clerk, then and there calling to his assistance the three judges of the county court then in session, canvassed and computed the votes which had been given and cast for and against said subscription and ascertained from said returns that 1,049 voters had voted in favor of the proposition submitted by said order and in favor of subscribing $200,000 to the capital stock of the said relator on the terms in said order set forth, and that 257 voters had voted against the same; that after the said returns had been canvassed of said special election as aforesaid the said county court caused to be placed upon the records thereof the following:

STATE OF MISSOURI, } ss:
County of Sullivan, }

Now, at this day, February 23d, 1870, the poll books for the special election held in the county of Sullivan and State of
18 Missouri at the various election precincts thereof on the 22 day of February, 1870, as presented to the county court, are examined and counted and the following found to be the vote cast, to wit: "Shall Sullivan county, in the State of Missouri, subscribe $200,000 to the capital stock of the Quincy Missouri and Pacific Railroad Company upon the conditions and limitations provided in an order of the county court of said county made at its December term, 1869, entitled railroad order?" yes, 1,049 votes; no, 257 votes.

That the said county court, after said canvass and returns and ascertainment of said votes, and in order to give effect to the will of the people of said county, more than two-thirds of the qualified voters of said county having at such special election assented thereto, made an order of record authorizing and instructing the then president and presiding justice of said county court, James Beatty, Esq., and the then clerk of said court, Jno. Q. Boner, Esq., to make and enter said subscription in the stock books of the relator, The Quincy, Missouri and Pacific Railroad Company; that the said presiding justice and the said clerk afterward, to wit, on the 5th day of April, 1871, in accordance with the terms of said order, did subscribe the sum of $200,000 to the capital stock of the relator, payable in the bonds of said county, as specified in said election order; that the said court placed and caused to be placed on the records thereof its order in words and figures as follows, the same which were used in subscribing to the capital stock of the relator:

STATE OF MISSOURI. } ss:
County of Sullivan, }

Whereas Sullivan county has voted in favor of said county
19 subscribing $200,000 to the capital stock of the Quincy, Missouri and Pacific Railroad Company: Therefore be it ordered

that the president and clerk of the county court of said county of Sullivan be, and are hereby, authorized to enter said subscription on the stock books of said company and also upon the records of this court upon the conditions contained in and expressed in an order rendered by said county court at its December term, 1869: Now, therefore, I, James Beatty, presiding justice of the Sullivan county court, in pursuance and by the authority in me vested by said order, duly authorizing, directing, and empowering me so to do, have and do hereby enter in the stock books of the Quincy, Missouri and Pacific Railroad Company and in the name of and for said county of Sullivan do hereby subscribe for and take $200,000 of the capital stock of said Quincy, Missouri and Pacific Railroad Company, subject, however, and expressly taken upon the conditions set forth in the order of this court made the 22nd day of December, 1869, as copied in this entry, for the protection and safety of said county in said stock and subscription hereby made.

Given under my hand this April 5th, 1871.

(Signed) JAMES BEATTY,
Ex Officio President of the Sullivan County Court.

[Seal of Sullivan County Court.]

Attest: JNO. Q. BONER,
Clerk Sullivan County Court.

That the capital stock of the relator, as fixed and limited by its charter or articles of association, is six millions of dollars, divided into shares of $100.00 each, and that at the date of said subscription but a small portion of the entire capital stock had been subscribed; that the articles of association of the relator, The Quincy, Missouri and Pacific Railroad Company, were filed in the office of the secretary of state on the 29th day of June, 1869, and that within two years thereafter said company began the construction of its road as aforesaid, and within one year after the commencement of the construction of its said railroad had expended more than the sum of $600,000 thereon; that after the 29th day of June, 1869, and before the 29th day of June, 1879, the relator had surveyed and permanently located its said railroad continuously through the State of Missouri from West Quincy, in Marion county, in said State, to a point on the Missouri river, in Atchison county, Missouri, opposite the city of Brownsville, in the State of Nebraska, or as nearly opposite thereto as practicable; that after the commencement of the work as aforesaid the building of said line of railroad was pushed rapidly forward until *on* or about the month of October, 1873, at which last said date said railroad had been completed, ironed, and put in operation to the town of Kirksville, in the county of Adair, in the State of Missouri, when the said company were compelled by reason of financial embarassments to temporarily suspend the further construction of its said railroad until *on* or about the month of November, 1876, when the construction of said railroad on the line hereinbefore designated westward from said town of Kirksville was recommenced.

That on and prior to the 29th day of June, 1879, the relator, the said railroad company, had constructed and was operating its line of railroad from West Quincy aforesaid to a point about 16 miles west of said town of Kirksville, and from such terminal operating point had continuously constructed its road-bed, bridges, and superstructure to the eastern bound-ry line of Sullivan county aforesaid, and from the last-named point long prior to the date
21 last aforesaid had continuously graded, bridged, and tied two sections of six miles each—in all twelve miles—within the limits of Sullivan county aforesaid, from said eastern boundary of said county in a westerly direction through the said county and upon the line designated at the time of making said subscription.

That the said relator, on the — day of ——, 1879, and on divers other days and times before and since said day, has offered to show to said county court of Sullivan county and the said judges that it had performed its undertakings as above set forth, and to the extent as above named, so as to entitle the relator to have and receive from the said county court and from the said judges, on behalf of said county, two installments of bonds of forty thousand dollars each, or eighty thousand in bonds of said county, in payment for so much stock subscribed as aforesaid and purchased by said county and agreed to be paid for in bonds; that the relator then, theretofore, and thereafter tendered to said court and the said judges certificates of stock in the capital stock of said company to the amount aforesaid and demanded bonds to the amount aforesaid, viz., in the amount of $80,000, of the said county and of the said judges, but the said judges and the said county court declined to hear any proof of the performance of the conditons on the part of relator entitling it to have and receive the said $80,000 in bonds and failed and refused to accept certificates of stocks in the said company in the said amount, and refused and failed and declined to issue to the relator the said $80,000 in bonds or any part or portion thereof, and the said judges and the said county court of Sullivan county, composed of the judges aforesaid, refused and failed and still refuse and fail to issue and deliver to the relator the said bonds or any part thereof.

22 That by reason of the said alleged wrongful and illegal acts of the said judges as above set forth the relator has been and is deprived of the said bonds, and is illegally and wrongfully kept out of them, and that relator is entirely without remedy except it be afforded by writ of mandamus.

We, therefore, being willing that due and speedy justice be done to the said relator, The Quincy, Missouri and Pacific Railroad Company, in this behalf command you that, immediately after the receipt of this writ, you do, without further excuse or delay, deliver or cause to be delivered to the relator $80,000 in the bonds of said county of Sullivan in payment for so much stock heretofore subscribed, the bonds to be in the usual form of railroad bonds and to bear interest from date at the rate of 7 per centum per annum, payable annually, to bear date of the day of their issue and to become due and payable 20 years after their date: Provided, however, that

you may at your election provide for and pay off ten per cent. of the principal of said bonds each year after 10 years shall have elapsed from the date of the same; and provided also that you may provide in said bonds for such payment of principal or signify to us cause to the contrary, lest in your default complaint should come to us again, and that you are to certify full and perfect obedience to and due execution of this writ to the said circuit court for the eleventh judicial circuit, in the State of Missouri, now setting at Milan, in the said county of Sullivan, on the 15th day of May, A. D. 1882.

Herein fail not at your peril, and have then and there this writ.

Witness the judge of said circuit court for the eleventh
23 judicial circuit aforesaid, at Milan, the 15th day of May, 1882.

G. D. BURGESS,
Judge Circuit Court of Sullivan Co., Mo.

And afterwards, to wit, on the 19th day of May, 1882, the respondents filed their answer and return to the amended alternative writ so issued, which is in words and figures following, to wit:

Answer to Alternative Writ.

In the Circuit Court of Sullivan County, Missouri, May Term, 1882.

THE STATE OF MISSOURI at the Relation of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY
against
ANDERSON W. HARRIS, THOMAS MONTGOMERY, and GEO. T. TODD, Justices of the County Court of Sullivan County, Missouri, Respondents.

Now, at this day, comes the respondents, by attorney, and for return to the alternative writ in said cause say that they deny each and every allegation therein contained, except it be herein expressly admitted.

1st. Respondents admit that they are the justices of the county court of said county.

II. Respondents say that as to whether the Quincy, Missouri and Pacific Railroad Company is a corporation organized and existing under the laws of the State of Missouri they have no knowledge or information sufficient to form a belief, and ask that strict proof thereof be required.

III. Respondents state that as to whether the relator, in the year 1869 or at any other time, was engaged in the construction of a railroad from a point on the Mississippi river opposite the city
24 of Quincy, in the State of Illinois, in Marion county, Missouri, to a point on the Missouri river in Atchison county, Missouri, opposite the city of Brownsville, in the State of Nebraska, they have no knowledge or information sufficient to form a belief, and ask that strict proof thereof be required.

IV. Respondents state that as to whether the county court of said county did order a special election to be held at the usual and various voting places in said county as then established by law, on the 22nd day of February, 1870, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan would assent to a subscription of two hundred thousand dollars to the capital stock of relator upon any condition whatever, they have no knowledge or information sufficient to form a belief, and they ask that strict proof thereof be required.

V. Respondents deny that there was any special registration of the qualified voters of said county who had become such since the last general registration and subsequent special registration of the qualified voters of said county prior thereto was had and held in the various municipal townships in said county prior to the holding of such special election, as alleged in the alternative writ.

VI. Respondents deny that any notice was ever given that a special election would be held for the purposes mentioned in the alternative writ, either by posting three copies of the order therein mentioned in each municipal township in said county or in any of said townships, or that any copy of such order was ever published in the Weekly North Missouri Herald or any other newspaper.

25 VII. Respondents deny that any returns of any special election, as *eleged* in the alternative writ, were ever made to the clerk of the county court of said county on the 23d day of February, 1870, or at any other time.

VIII. Respondents deny that the clerk of said county called to his assistance the three judges of the county court of said county and canvassed and computed the votes which had been given and cast in the various townships of said county for and against any subscription to the capital stock of relator, as alleged in the alternative writ, on the 23d day of February, 1870, or at any other time.

IX. Respondents deny that one thousand and forty-nine voters voted in favor of the subscription of two hundred thousand dollars to the capital stock of relator as alleged in the alternative writ, or that two hundred and fifty-seven voters voted against such subscription as alleged in the alternative writ.

X. Respondents deny that one thousand and forty-nine voters were two-thirds of the qualified voters of said county.

XI. Respondents deny that the county court of said county, on the 23d day of February, 1870, made any order to the effect that one thousand and forty-nine voters had voted for the proposition to subscribe two hundred thousand dollars to the capital stock of relator, and that two hundred and fifty-seven voters had voted against such proposition, as alleged in the alternative writ.

XII. Respondents deny that there were any judges of election appointed to hold the special election in the respective voting precincts in said county.

XIII. Respondents deny that Sullivan county, Missouri,

26 ever at any time made a subscription of two hundred thousand dollars to the capital stock of relator.

XIV. Respondents state that as to whether the relator located its

line of railway between West Quincy, in Marion county, Missouri, and a point in Atchison county, Missouri, opposite the city of Brownsville, in the State of Nebraska, they have no knowledge or information sufficient to form a belief, and ask that strict proof thereof be required.

XV. Respondents deny that the relator ever at any time built its line of railroad through Sullivan county, Missouri, from east to west on a line near the center of said county or in any manner whatever constructed its line of railroad as prescribed in the alleged order of subscription set out in the alternative writ.

XVI. Respondents state that more than five years elapsed between the date of the alleged subscription and the alleged performance of the work as set out in the alternative writ.

XVII. Respondents deny that the relator ever at any time made proof that said alleged contract had been complied — or that respondents should be required to issue the bonds as required in said alternative writ.

Wherefore respondents, having made full return to the conditional writ in this cause, ask that they be discharged with their costs in this behalf.

S. F. LINN,
Prosecuting Att'y for Sullivan County, Mo.
L. T. HATFIELD,
Special Counsel.

27 And afterwards, at the November term and on the 25th day of Nov., 1882, there was filed a reply herein, which is in words and figures following, to wit:

In the Circuit Court of Sullivan County, Missouri, Nov. Term, 1882.

THE STATE OF MISSOURI at the Relation and to the Use of THE Q., M. & P. R. R. Co., Relator,
against
A. W. HARRIS, THOMAS MONTGOMERY, and GEORGE T. TODD, Judges of the County Court of Sullivan County, Mo.

Now comes the relator and for denial of respondents' return says that such return is insufficient in law to constitute a sufficient return to the alternative writ, and, further, that it is not true, as alleged in return of defendants, other than as stated in relator's petition and the alternative writ.

McCABE & BUTLER,
For Relator.

And afterwards, to wit, at the November term and on the 27 day of November, 1882, the following other proceedings were had, to wit:

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Relator,
against
ANDERSON W. HARRIS, THOMAS MONTGOMERY, and GEORGE T. TODD, Judges of the Sullivan County Court, Respondents.

Now, to wit, November 27, 1882, the application of the relator for the issue of a peremptory writ of mandamus herein
28 comes on for final hearing and determination upon the allegation of the alternative writ of mandamus, heretofore issued herein, the denial of the allegations therein on the part of respondents, and the replication on the part of relator. The relator appearing by its attorneys and as well also the respondents by their attorneys and the respective parties answering ready for trial, the court proceeds to hear the testimony offered on the part of the relator and as well also the evidence on the part of the respondents, and the court, being advised as to the law and fact arising thereupon, doth find that the contract of subscription between Sullivan county, Missouri, and the relator company was made substantially in manner and form as alleged in the allegation of the alternative writ. The court further finds from the evidence that prior to the 29th day of June, 1879, and prior to the filing of the petition for the alternative writ of mandamus herein, the relator's company had substantially complied with the conditions of said contract of subscription by the completion of said railway according to the terms thereof.

The court further finds from the evidence that there were 1,306 votes cast at the special election held in said county to determine the sense of the voters as to whether the county court should or should not make said subscription; that 1,049 votes were cast in favor of said subscription and 257 votes against the same; that more than two-thirds of the qualified voters of said county voting at such election voted in favor of such subscription, but the court further finds from the registration books of said county offered in evidence that there were 1,940 persons duly registered as qualified voters in said county at the time of said election.

29 Wherefore the court finds, adjudges, and decrees that two-thirds of the qualified voters of said county did not vote in favor of such subscription, and that by reason thereof there was a want of a valid power existing in the county court of said county to make the contract of subscription in question.

It is therefore considered, adjudged, and decreed by the court here that the relator's application for a peremptory writ of mandamus be denied, that the alternative writ issued herein be dismissed, that the respondents go hence without day, and that they have and recover from the relator's company their costs in this suit laid out and expended, taxed at the sum of — dollars and — cents, and that they have execution therefor.

And afterwards, to wit, at the same term, Nov. 27, 1882, the following further proceedings were had, to wit:

Motion for New Trial. Order Overruling Same.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Relator,
against
A. W. HARRISS, THOMAS MONTGOMERY, and GEO. T. TODD, Judges of the Sullivan County Court, Respondents.

Now, on this 27 day of November, 1882, comes the plaintiff, by its attorney, and with leave files herein its motion for a new trial, and by agreement of parties the motion for a new trial was taken up, seen, and, being understood by the court, is overruled.

And afterwards, to wit, at the same term of the court last aforesaid, and on the 27 day of November, 1882, the following proceedings were had, to wit:

30 *Motion in Arrest & Order Overruling Same.*

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI & PACIFIC RAILROAD COMPANY, Relator,
against
A. W. HARRISS, THOMAS MONTGOMERY, and GEORGE T. TODD, Judges of the Sullivan County Court, Respondents.

Now, on this 27th day of November, 1882, comes the plaintiff, by its attorneys, and, with leave of court, files motion in arrest of judgment, and by agreement of parties motion in arrest was taken up, and, being seen and fully understood, is by the court overruled.

And afterwards, to wit, at the same term, on the 27th day of November, 1882, and at the November term of said court, the following further proceedings were had in said cause, to wit:

Order Filing Bill of Exceptions.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Relator.
against
A. W. HARRISS, THOMAS MONTGOMERY, and GEORGE T. TODD, Judges of the County Court of Sullivan Co., Mo., Respondents.

Now, on the 27th day of November, 1882, comes the plaintiff, by its attorneys, and, with leave of court, filed herein its bill of exceptions.

Which said bill of exceptions is in words and figures following, to wit:

In the Circuit Court of Sullivan County, Missouri, November Term, 1882.

STATE OF MISSOURI *ex Rel.* QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY
against
A. W. HARRISS *et al.*

31 Be it remembered that in the progress of the trial of this cause the relator, to sustain the issues on its part, offered the following evidence, to wit:

"The articles of association of the Quincy, Missouri and Pacific Railroad Company, dated June 29th, 1869."

Which said articles of association are in words and figures as follows, to wit:

Articles of Association.

These articles of association, made and entered into this twenty-fo-rth day of June, A. D. eighteen hundred and sixty-nine, under and *and* by virtue and in pursuance of an act passed by the General Assembly of the State of Missonri entitled "An act concerning private corporations," chapter- sixty-nine and seventy, approved the nineteenth of March, A. D. eighteen hundred and sixty-six, and in accordance with the provisions of chapters sixty-two and sixty-three of the General Statutes of the State of Missouri of eighteen hundred and sixty-five and all subsequent amendments to the acts aforesaid, make and form ourselves into a company for the purpose of construction, maintaining, and operating a railroad for public use in the conveyance of persons and property within the limits of the counties of Marion, Lewis, Knox, Adair, Sullivan, Grundy, Harrison, Gentry, Nodaway, and Atchison, in the State of Missouri.

The said railroad to be constructed, maintained, and operated from the west end of the Quincy railroad bridge or from a point near the same on the west bank of the Mississippi river, in Marion county, in the State of Missouri, opposite the city of Quincy, in the State of Illinois, on the most practicable and feasible route
32 to and by way of Edina, in Knox county, and to and by way of Kirksville, in Adair county, to a point in Atchison county, on the Missouri river, opposite the city of Brownsville, in the State of Nebraska, the length of said railroad being, as near as can be estimated by the present survey, about two hundred and thirty miles.

The name and style of the company hereby formed is "The Quincy, Missouri and Pacific Railroad Company," and under that name and style shall continue to exist for the term of one thousand years from this date.

The capital stock of said company is hereby fixed at the sum of six millions ($6,000,000) of dollars and is divided into sixty thousand shares of one hundred dollars each.

The following-named persons, being a portion of those whose names are hereunto subscribed, to wit:

John Winterbottom, of Knox county, Missouri;
W. C. Hillis, of Knox county, Missouri;
C. A. Savage, of Quincy, Illinois;
Thomas Jasper, of Quincy, Illinois;
Thomas Redmond, of Quincy, Illinois;
George Adams, of Quincy, Illinois;
C. H. Bull, of Quincy, Illinois;
T. R. Selmers, of Quincy, Illinois;
C. M. Pomroy, of Quincy, Illinois;
James M. De France, of Adair county, Missouri;
M. G. Roseberry, of Nodaway county, Missouri;
A. W. Morgan, of Brownsville, Nebraska;
John Wood, of Quincy, Illinois;

are here named and appointed to be the directors of the
33 company, and do in that capacity consent to take upon themselves to manage the affairs of the company for the first year and until other directors are chosen in their places, in pursuance of the acts hereinbefore mentioned.

In witness whereof and under the authority of the said acts and for the purpose hereinbefore stated we, the undersigned, have hereunto subscribed our respective names and places of residence and have set opposite our respective names the number of shares of one hundred dollars each we do hereby subscribe to the capital stock of the company.

34 *Objection by Resp. to Articles of Association.*

To the introduction of which the defendants objected because no profile or map of the route intended to be adopted by the company had been made and filed in the office of the county clerk, nor had written notice been given to occupants of the land over which the route of the road is so designated, as required by section 12, chapter 63, General Statutes of Missouri of 1865; because said company has not made or caused to be made and filed in the office of the recorder of deeds the map and profile required by section 44 of act of March 24, 1870. They object because there is no evidence to show that they begun the construction of their road within two years after the filing of the articles of association, as required by section 46, article 2, page 312, first Wagner Statute; which objections were by the court overruled; to which ruling of the court defendant excepted at the time.

Edward McCabe's Testimony.

EDWARD MCCABE, sworn as a witness for the relator, testified as follows: I was general attorney of the Q., M. & P. R. R. Co. from the time of its organization, June 29th, 1869, until quite a time thereafter. The construction of said road began before the 22nd day of December, 1869.

Relator then offered in evidence the order of the Sullivan county court, dated the 22nd day of December, 1869, submitting to the voters of said county the question whether they would subscribe the sum of $200,000 *dollars* to the capital stock of the Q., M. & P. R. R. Co., which order is in words and figures following, to wit:

35 *Order Sullivan Co. Court Whether They Would Subscribe $200,000, &c.*

In the County Court of Sullivan County, at the December Adjourned Term of 1869.

Be it remembered that a special election be holden in said Sullivan county at the various election precincts thereof on the 23rd day of February, 1870, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan will consent to a subscription in the sum of two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company, subject, however, to the following express conditions, to wit: Said railroad to be located and constructed through said Sullivan county from east to west on a line as near through the center of said county as practicable, said company to locate, build, and maintain a general freight and passenger depot within one-half mile of the town of Milan and south or west of the geographical center of said county, and also a depot at or as near Greencastle, in the east part of said county, as practicable, and one at or as near Wintersville, in the west part of said county, as practicable; that said subscription be paid to said company in the bonds of said county at par. Said bonds shall bear interest at the rate of seven per centum, payable annually, to bear date the day of their issue and become due and payable twenty years after the date thereof, provided the county court of said county may at its election provide for
36 and pay off ten per cent. of the principal of said bonds each year after ten years have elapsed from the date of said bonds and may provide in said bonds for such payment of principal; that whenever said company shall have surveyed and permanently located said railroad continuously through said State of Missouri from West Quincy, in Marion county, in said State, to some point on the Missouri river opposite or near Brownsville, in Nebraska, and shall have continuously graded, bridged, and tied six miles of said railroad within Sullivan county aforesaid, upon the line hereinbefore designated, then the county court of said Sullivan county shall issue and deliver to said railroad company the bonds of said Sullivan county to the amount of forty thousand dollars, and for each additional section of six miles so continuously graded, bridged, and tied within said county of Sullivan said county court shall issue and deliver to said company an additional sum of forty thousand dollars in the bonds of said county as aforesaid until the whole subscription aforesaid shall have been paid up:

Provided that the last installment of said subscription shall not be paid to said company until said railroad shall have been com-

pletely and continuously graded, bridged, and tied from the eastern boundary of said Sullivan county to the western boundary of said Sullivan county.

And be it ordered that at said special election all persons
36½ voting for such subscription shall have written or printed on their ballots " — two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions and limitations provided in an order of the county court of said county of Sullivan made at its December term, 1869, entitled railroad order? Yes," and those voting against said subscription shall have written or printed on their ballots, "Shall Sullivan county, in the State of Missouri, subscribe to the capital stock of the Quincy, Missouri and Pacific Railroad Company the sum of two hundred thousand dollars upon the stipulations, limitations, and conditions prescribed in the order of the county made at its December term, 1869, entitled railroad order? No."

And be it further ordered that twenty days' notice of such special election be given by the sheriff of said county by causing to be published a copy of this order in the Weekly North Missouri Herald and by posting at least three copies of this order in each municipal township in said county twenty days prior to said election, and that the clerk of the court furnish the sheriff of said county a copy of this order.

The relator then offered order of the county court dated Feb. 23rd, 1870, declaring the result of said election, which is in words and figures following, to wit:

37 *Order of the Co. Court Declaring Result of Election.*

STATE OF MISSOURI, } ss:
County of Sullivan, }

Whereas Sullivan county has voted in favor of said county subscribing two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Raidroad Company, therefore be it ordered that the president and clerk of the county court of said county be and are hereby authorized to enter said subscription upon the stock books of said company and also upon the records of this court, upon the conditions contained and expressed in an order rendered by said county court at its December term, 1869:

Now, at this day, Feb'y 23rd, 1870, the poll books for the special election held in the county of Sullivan, State of Missouri, at the various election precincts thereof, on the 22nd day of February, A. D. 1870, as presented to the county court, are examined and counted and the following found to be the votes cast, to wit: "Shall Sullivan county, in the State of Missouri, subscribe two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions and limitations provided in an order of the county court of said county made at its December term, 1869, entitled railroad order?" Yes, 1,049 votes; no, 257 votes; majority for, 792 votes.

38 *Objections by Resp's.*

To the introduction of which the defendant- objected, because there was no proof of registration and no appointment of judges of election; which objection was overruled and the order read in evidence. The defendant at the time excepted to said ruling.

The relator then offered in evidence an order of the county court, dated April 5th, 1871, authorizing James Beatty, presiding justices of said court, and John Q. Boner, the clerk thereof, to make and enter a subscription on the stock books of said company; which order is in words and figures as follows, to wit:

Order Co. Court; Make & Enter of Co. the Subscription.

STATE OF MISSOURI, } ss:
County of Sullivan, }

In the County Court, in Vacation.

Now, at this day, comes James M. De France, agent of the Quincy, Missouri and Pacific Railroad Company, and presents the stock books of said company and requests that the subscription of two hundred thousand dollars to the capital stock of said railroad company voted by the citizens of said Sullivan county to aid in the construction of said railroad be subscribed on the stock books of said Quincy, Missouri & Pacific Railroad Company, agreeable to an order of the county court made at the December term, 1870:

Now, therefore, I, James Beatty, the presiding justice of the county court of Sullivan county, Missouri, in pursuance and
39 by the authority in me vested by said order duly authorizing and directing and empowering me so to do, have and do hereby enter in the stock book of the Quincy, Missouri & Pacific Railroad Company, and in the name of and for said county of Sullivan do hereby subscribe for and take, two hundred thousand dollars of the capital stock of the said Quincy, Missouri & Pacific Railroad Company, subject, however, and expressly taken upon the conditions set forth in the order of this court made at its December term, on the 22nd day of December, 1869, as copied on said book for the protection and safety of said county in said stock and subscriptions hereof made *in said stock and subscription hereof made.*

Given under my hand this April 5th, 1871.

JAMES BEATTY,
Ex Officio President of the County Court.

Attest: J. Q. BONER, *Clerk.*

Objection by Respondents.

To the introduction of which the defendants objected, because such order was without authority of law; which objection was overruled by the court; to which ruling of the court — at the time excepted, and said order was read in evidence.

Edward McCabe's Testimony, Recalled.

EDWARD MCCABE was recalled as witness for relator and testified as follows:

The books here shown me are the subscription books of
40 the Quincy, M. & P. R. R. Co. and vol. 2 of records proceeding- of the board of directors of said company.

Stock Books Offered & Read in Evidence.

The relator then offered in evidence the stock books of said company, showing the subscriptions by James Beatty, presiding justice of the county court of Sullivan Co., Mo., and John Q. Boner, clerk of said county, to the capital stock of said R. R. Co. in compliance with the order of the county court as follows, to wit:

41 *Subscription as Entered on the Stock Books of said Company.*

December Adjourned Term, 1869.

STATE OF MISSOURI, } ss:
County of Sullivan, }

Railroad order.

Whereas in the county court of Sullivan county, at the December adjourned term of 1869—

It was ordered that a special election be holden in said Sullivan county, at the various voting precincts thereof, on the twenty-second day of February, eighteen hundred and seventy, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan will assent to a subscription in the sum of two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company, subject, however, to the following express conditions, to wit: Said railroad to be located and constructed through said Sullivan county from east to west on a line as near through the center of said county as practicable, said company to locate, build, and maintain a general freight and passenger depot within one-half mile of the town of Milan and south or west of the geographical center of said county, and also a depot at or near Greencastle, in the east part of said county, as practicable, and one at or near Wintersville, in the west part of said county, as practicable; that said subscription be paid to said company in the bonds of said county at par. Said bonds shall bear interest at the rate of seven per centum, payable annually, to bear date the day of their issue and become due and payable twenty years after the date thereof, provided the county court of said county may at
42 its election provide for and pay off ten per cent. of the principal of said bonds each year after ten years have elapsed from the date of said bonds and may provide in said bonds for such payment of principal; that whenever said company shall

have surveyed and permanently located said railroad continuously through said State of Missouri from West Quincy, in Marion county, in said State, to some point on the Missouri river opposite or near Brownsville, in Nebraska, and shall have continuously graded, bridged, and tied six miles of said railroad within Sullivan county aforesaid upon the line hereinbefore designated, then the county court of said Sullivan county shall issue and deliver to said railroad company the bonds of said Sullivan county to the amount of forty thousand dollars, and for each additional section of six miles so continuously graded, bridged, and tied within said county of Sullivan said county court shall issue and deliver to said company an additional sum of forty thousand dollars in the bonds of said county as aforesaid until the whole subscription aforesaid shall have been paid up, provided that the last installment of said subscription shall not be paid to said company until said railroad shall have been completely and continuously graded, bridged, and tied from the eastern boundary of said Sullivan county to the
43 *the* western boundary of said Sullivan county; and be it further ordered that — said special election all persons voting for such subscription shall have written or printed on their ballot, "Shall Sullivan county, in the State of Missouri, subscribe two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions and limitations provided in order of the county court of said county of Sullivan made at its December term, eighteen hundred and sixty-nine, entitled railroad order?" "yes," and those voting against said subscription shall have written or printed on their ballots, Shall Sullivan county, in the State of Missouri, subscribe to the capital stock of the Quincy, Missouri and Pacific Railroad Company the sum of two hundred* thousand dollars upon the stipulations, limitations,
x
and conditions prescribed in the order of the county court of said county made at its December term, eighteen hundred and sixty-nine, entitled railroad order? "no."

And be it further ordered that twenty days' notice of such special election be given by the sheriff of said county by causing to be published a copy of this order in the Weekly North Missouri Herald and by posting at least three copies of this order in each municipal township in said county twenty days prior to said election, and that the clerk of this court furnish the sheriff of said county a copy of this order; and whereas on this day, Feb'y 23rd, 1870, the
44 poll books for the special election held in the county of Sullivan and State of Missouri, at the various election precincts thereof, on the (22nd) twenty-second day of February (A. D. 1870), eighteen hundred and seventy, as presented to the county court, are examined and counted and the following found to be the vote cast, to wit: "Shall Sullivan county, in the State of Missouri, subscribe two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions and

*Erased in copy.

limitations provided in an order of the county court of said county made at its December term, eighteen hundred and sixty-nine, entitled railroad order?" yes, 1,049 votes; no, 257 votes; majority for, 792 votes.

STATE OF MISSOURI, } ss:
County of Sullivan, }

Whereas Sullivan county has voted in favor of said county subscribing two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company, therefore be it ordered that the president and clerk of the county court of said county be, and are hereby, authorized to enter said subscription upon the records of this court upon the conditions contained and expressed in an order rendered by said county court at its December term, eighteen hundred and sixty-nine:

45 Now, therefore, I, James Beatty, the presiding justice of the Sullivan county court, in pursuance and by the authority investing and empowering me so to do, have, and do hereby, enter in this the "Stock Book of the Quincy, Missouri and Pacific Railroad Company and in the name of and for said county of Sullivan do hereby subscribe for and take two hundred thousand dollars of the capital stock of the said Quincy, Missouri and Pacific Railroad Company," subject, however, and expressly taken upon the conditions set forth in the order of this court made on the 22nd day of December, 1869, as copied in this entry for the protection and safety of said county in said stock and subscription hereby made.

Given under my hand this April 5th, 1871.

[SEAL.] JAMES BEATTY,
Ex Officio President of the County Court of Sul. County.

Attest: JOHN Q. BONER,
Clerk Sullivan County Court.

To the introduction of which the defendants objected because it was without authority of law; which objection was by the court overruled, and defendants at the time excepted.

Relator then offered in evidence record of the proceedings of the board of directors of said company, vol. 2, showing location of said railroad.

Which is as follows, to wit:

Proceedings Board of Directors Showing Location.

46 Special meeting.

QUINCY, *June* 7, 1879.

A special meeting of the board of directors was held at the rooms of the Union bank, Quincy, Illinois, at 7 p. m., this date, pursuant to call of the president—present, President Root, in the chair, and Directors Menke, Wheeler, Tarkworthy, Miller, Sawyer, Smith, and Green, a majority of said board—among other, the following proceedings were had, to wit:

Proceeding- of the Board of Directors Showin- Location of R. R.

On motion of Director Wheeler, the following preamble and resolution were unanimously adopted:

Whereas it appears that no formal action of this board touching the location of the line of its road continuously through the State of Missouri appears of record and the board having now under consideration the matter of the location of the completed and uncompleted portion of the line, it is therefore resolved by the board of directors of the said Quincy, Missouri and Pacific Railroad Company that the said railroad be, and is hereby, located from a point opposite the city of Quincy, in the State of Illinois, from a point at the west end of the Quincy railroad bridge, in Marion county, Missouri, westward through the counties of Marion, Lewis, Knox, Adair, and Sullivan on the lines as now completed, maintained, and operated to Novinger, in said county of Adair, to and by way of Edina, in Knox county, and to and by way of Kirksville, in Adair county, in the said State of Missouri, and that the same be, and is hereby, located from Novinger aforesaid westward on the line now actually graded, bridged, and tied from Novinger aforesaid to a point in said county of Sullivan near Milan, in said county;

47 that the said line is hereby located from the said Novinger westward, as indicated and shown by the line continuously graded, bridged, and tied from said Novinger to the beforenamed point near Milan, and the whole of the line in said county of Sullivan, from the western boundary of Adair county aforesaid, is hereby located as near the center of said county of Sullivan as practicable, as shown by the map or maps filed and to be filed in the office of the clerk of the county court of said county of Sullivan. The said line is located and is to pass from east to west within one-half mile of the town of Milan, in said county of Sullivan, and as near through the center of said county as practicable, as shown by said map, and there is hereby located a general freight and passenger depot within one-half mile of the town of Milan and southwest of the geographical center of said county, and also a depot at or near Greencastle, in the east part of said county; and also there is hereby located a depot at or near Cowtinville, in the west part of said county; and the said railway is hereby located continuously through the said State of Missouri from a point near Milan aforesaid to which the said road is now graded, bridged, and tied, westwardly through the counties of Sullivan, Grundy, Harrison, Gentry, Nodaway, and Atchison to a point opposite Brownsville, in the State of Nebraska, and from the west end of the said Quincy railroad bridge through the said State of Missouri, by way of Edina, in Knox county, and by way of Kirksville, in Adair county, through the said county of Sullivan, as above indicated, to the said point in Atchison county, on the Missouri river, opposite Brownsville, in the State of Nebraska."

On motion of Director Sawyer, the board adjourned.

[SEAL.] J. G. ROWLAND, *Secretary.*

48 *Objection by Respondents Overruled.*

To the instructions of which the defendants objected, because the record does not show permanent location of said railroad nor can such permanent location be shown because relator cannot locate its railroad without work being done; which objections were, by the court, overruled, and the same was read in evidence; to which ruling of the court defendants at the time excepted.

E. M. Collins' Testimony.

E. M. COLLINS, sworn for the relator, testified as follows:

My occupation is civil engineering. I was in the employ of the Q., M. & P. R. R. Co. in the capacity of an assistant engineer from about the month of June, 1869; about the commencement of work on said road; continued in the employ of said company until 1873 and 1874, when the construction, by reason of the panic, ceased. In 1877 I became chief engineer of said company, and in Dec., 1877, located the same from Kirksville to Novinger, the said railroad having previously been located and built from West Quincy to Kirksville. As such civil engineer I located the line of said railroad from Novinger to Greencastle in the spring of 1878, and continued the location thereof to the city of Milan. During the summer of that year, on the same general line on which the same is now being operated, there were more than twelve miles of said road within said county graded, bridged, and tied prior to the 29th day of June, 1879.

Cross-examination:

The distance between Novinger and Greencastle is about twelve miles. In the years 1870–'1 we made some preliminary surveys in a northwest direction from Milan, which preliminary surveys ran a mile or two south of the town of Wintersville, but we never made any permanent location there.

49 *A. Payne et al., Witness- for Relator.*

Relator then produced Addison Payne, E. L. Fish, M. Hare, and J. M. Campbell, who, being sworn on part of relator, gave evidence tending to prove relator's compliance with the contract of subscription as to the first 12 miles within said county.

Record of Sullivan County Court Showing Demand.

Relator then offered in evidence record of the Sullivan county court showing a demand for the issue of the bonds and a tender to said county court of a certificate of stock and a refusal of said court to issue said bonds, which is in words and figures as follows, to wit:

The Quincy, Mo. & Pacific R. R. Co. Tender of stock & demand for bonds.

In the matter of subscription of Sullivan county, Mo., to the capital stock of the Quincy, Missouri and Pacific Railroad Company and tender to the court — a certificate for 800 shares of $100.00 each in the capital stock of said company and the demand of eighty thousand dollars in bonds in payment of 1st & 2nd installments.

Whereas the said railroad company have wholly failed and neglected to comply with the contract for said subscription, it is therefore considered and adjudged by the court that — the 1st & 2nd installments nor any other installments are due said railroad company, and that the bonds in payment of said 1st & 2nd installments be not issued, and that the stock and the certificate for the same be, and the same is hereby, rejected and refused.

Which was thereupon read in evidence.

Tender of Cert. of Stock.

Thereupon the relator tendered to the defendants a certificate of stock for 800 shares of the capital stock of the Q., M. & P. R. R. Co., which said defendants then and there declined to receive,
50 such certificate being in words and figures following, to wit:

Certificate of Stock.

(Number 490.) (Shares, 800.)

Organized under the laws of the State of Missouri.

The Quincy, Missouri and Pacific Railroad Company. Capital stock, 6,000,000 dollars.

This is to certify that the county of Sullivan, State of Missouri, is entitled to eight hundred shares of the capital stock of the Quincy, Missouri and Pacific Railroad Company, transferable only on the books of the company in person or by attorney on the surrender of this certificate.

Witness the seal of the company and the signature- of the president and secretary, at West Quincy, this 6th day of Feb-
[SEAL.] ruary, A. D. 1882.

CHAS. H. BULL, *President.*
C. H. SPENCER, *Secretary.*

Relator Rests.

The relator here rested.

Whereupon the defendants asked an instruction in the nature of a demurrer to the evidence, as follows, to wit:

Admitting all the evidence on the part of relator to be true, the finding must be for respondent.

Respondent's Demurrer to the Evidence Refused.

Which was by the court refused; to which action of the court the defendant at the time excepted.

Joshua Grey et al. Testify for Respondants.

Thereupon the defendant produced Joshua Gray, Thomas McCallister, A. W. Harris, O. P. Phillips, E. E. Prindle, Buck Mason, Sumner Boynton, and S. M. Grigsby, who, being sworn, gave evidence tending to prove that the relator had not complied with the contract of subscription.

W. H. Custer.

W. H. CUSTER, introduced as a witness for defendants, testified as follows:

51 Myself, F. E. Stone, and W. B. Taylor composed the board of registration in 1869–'70. In the winter of 1869 we registered the county at a special registration, using the general registration books made in 1868; and in Feb'y, 1870, we again held a special registration in said county.

James Morris.

JAMES MORRIS, on part of the defendant, testified as follows:

I have been the clerk of the county court for the last eight years. (Registration books of 1868 and special registration of 1869–'70 here shown the witness.) These are registration books of Sullivan county of 1868 and subsequent special registration of 1869 and 1870.

F. E. Stone.

F. E. STONE, on the part of the defendant, testified as follows:

I have recently examined the registration books identified by Mr. Morris. They are books used for the general election in 1868 and at the special election in 1869 and 1870. They were prepared and arranged for use by W. B. Taylor, W. H. Custer, and myself. The thirteen books now shown me are the books that were used at the special election held Feb'y 22, 1870. Mr. Custer made certified copies of special registration of voters for the use of the judges of election as soon as such registration was completed.

Cross-examined:

Myself, Taylor, and Custer composed the board of registration, and they held a special registration in the several townships and elections precincts prior to and for the special railroad election held on the 22 day of Feb., 1870, and appointed the judges for such election.

Registration Books Offered in Evidence.

Defendants then offered in evidence the original registration books and copies thereof as on file in the county clerk's office, and as prepared and used at the general election of 1868 and subsequent special elections of 1869 and 1870.

Registration Books are Objected to by Relator.

To the introduction of which the relator objected—

1st. Because the originals are mutilated and copies are
52 imperfectly certified.

2nd. Because they are in part only the original books and in part certified copies, while the law requires certified copies from the original lists which are furnished for the use of the judges of the election in the several voting precincts.

3rd. Because the law requires the registration officers to make alphabetical copies from which voters should vote, and there is no evidence to show that the list- offered are the ones voted from.

4th. Because the registration books are only intended as evidence to the judges of election of the person's right to vote when he offers to cast his ballot.

5th. Because the best evidence of the number of qualified voters in said county at the time of making such subscription is found in the whole number of votes cast at the special election so held to ascertain the sense of the voters of said county.

6th. Because, although such registration books might show a larger number of persons registered during the general registration of 1868 and subsequent special registration Sept. 2, 1869, and Feb. 17, 1870, than voted at such special election, yet it would not be any evidence that such persons found on such registry lists were qualified voters at the time of the election unless they actually voted.

7th. Because the record discloses the fact that the county court ordered an election which, after due notice, was lawfully held, the poll books and returns canvassed by the county clerk and judges, and the result judicially declared by the said county clerk and judges and the county court; that more than two-thirds of the qualified voters of said county had assented thereto, and the subscription duly entered upon the stock books of the company, and
53 that the company in good faith has completed its part of said contract of subscription, and the county cannot now for the first time be heard to deny the validity of such contract or to introduce evidence tending to impair the same.

8th. Because the record already in evidence show- an election to have been held, the poll books and election returns canvassed by the county clerk and the county judges, and upon such canvas and return the county court judicially declared that more than two-thirds of the qualified voters of said county had assented to such subscription, and thereupon ordered the stock to be subscribed and entered upon the stock books of said company.

9th. Because at the time of the making of this subscription by Sullivan county, to wit, April 5th, 1871, there can be no question but what it was the settled law of this State that if an election was duly held, conducted as required by law, and that more than two-thirds of the qualified voters of the county voting at the election voted in favor of the subscription, such election is valid and fully authorized the county to make and enter such subscription upon the stock books of the company, and when so entered because a valid and binding contract between the county and the company, and the attention of the court is here called to the case of The State *vs.* Winkelmeyer, 35 Mo., 103; also to the case of State *ex rel.* Jonathan M. Basset, plaintiff and petitioner, against Wm. P. Renick, mayor of the city of St. Joseph, respondents, 37 Mo., 270; also to the case of The State *vs.* Binder, 38 *id.*, 450; also to the case of State of Mo. *ex rel.* North Mo. Central R. R. Co. *vs.* Linn County Court, 44 *id.*, 504. It will be found in the cases cited that the supreme court of Missouri has made and declared a judicial interpretation that two-thirds of the qualified voters of a county, city, or town
54 voting at an election means the same thing as and is equivalent to two-thirds of the qualified voters of such county, city, or town voting at an election. Not only has it been so judicially determined, but this construction had been so universally adopted and acknowledged that the legislature of Missouri, in the act known as the township-aid act, approved March 23, 1868, gave it the same legislative construction by using in such act (according to the decision cited) synonomous words to those used in the constitution and general statutes of 1865, viz: "Two-thirds of the qualified voters of such township voting at such election."

10th. Because the judicial declaration and ascertainment by the county clerk and county judges in the manner and form required by law that more than two-thirds of the qualified voters of said county voted in favor of such subscription conferred upon the county court a valid power to make the subscription and contract in question, and is legal and binding upon all the world until set aside and annulled in a direct proceeding for that purpose, and cannot be attacked in the collateral manner attempted to be done in this case.

11th. Because by the terms of section 28 of declaration of rights in the constitution of Missouri of 1865 and in and by section 10 of article 1 of the Constitution of the U. S. it would have been incompetent for the legislature to impair the validity of the contract in question by a legislative enactment, and certainly courts cannot be permitted by judicial construction to do those things which the organic law prohibits the legislature from doing, and by such judicial construction impeach and impair the contract in question by overruling and overriding the former decision of the same court. When contracts have been made and rights become vested by reason of such former decisions and as the effect of this evidence is in
a collateral way to impeach and impair the validity of
55 the contract in question, which has in good faith been wholly

executed by the relator, such books ought not to be admitted for any such purpose.

Objection Overruled and Books Admitted in Evidence.

Which said several objections were by the court overruled and the said books admitted in evidence; to which action and ruling of the court the relator at the time excepted.

Relator Concedes that Registration Books Show 1,940 *Registered Voters.*

Thereupon the defendant began to read from the registration book of Polk township, in said county, used at the special election, Feb'y 22, 1870; but before completing the reading thereof counsel for relator conceded that the registration books offered in evidence, counting all those registered for general election of 1868 and those added in 1869, and those added for special election, Feb'y 22, 1870, contained the names of 1,940 persons as qualified to vote in said county at said election, and that said names were placed upon said books by the aforesaid registering officers and their predecessors in office for use in general election of 1868, the special election of 1869, and special election held Feb'y 22, 1870.

Defendants Rested.

Upon such concession being made, defendants rested.

E. M. Collins, for Relator, Recalled.

In rebuttal, E. M. COLLINS recalled and testified on behalf of relator as follows:

The building of the road—that is, the grading, bridging, and tieing—for the first twelve miles in Sullivan county costs $16,000 per mile. Had several conversations with Judge Grigsby, who then was and for some years previous had been sole judge of the county court, and he always said that when the contract was complied with the company should have the bonds. The preliminary original surveys run three or four miles south of Wintersville.

Cross-examined:

The first permanent survey in which the line was finally established west of Milan was made in 1880; made several pre-
56 liminary surveys prior to that time.

Edward McCabe Recalled.

EDWARD MCCABE, recalled, testified on behalf of the relator as follows:

"I am and have been for quite a number of years general attorney for the Q., M. & P. R. R. Co., and know that the company relied in good faith upon this subscription until after the railroad was completed. No question was ever made or mooted but that

two-thirds of the qualified voters of said county had voted in favor of said subscription."

Respondents Concede Number of Votes Polled in 1868.

Relator offered in evidence abstract of election returns in said county for 1868, which is as follows, to wit:

"In lieu of copying the entire abstract of the votes cast for the several candidates at the general election in 1868, it is admitted by the attorneys for the respondents that there *was* 926 votes for the Republican electors and 568 votes for the Democratic electors—in all, 1,494 votes; that there were a total of 1,489 votes cast for the several candidates for Congress; that there were in all 1,496 votes cast for the office of governor; that there were in all a total of 1,473 votes cast for members of the legislature, and that the foregoing represents the highest number of votes in said county polled at said election."

To the introduction of which the defendant objected on the grounds of its incompetency; which objection was by the court sustained, and was by the court rejected; to which action of the court relator at the time excepted.

Relator then offered in evidence abstract of votes cast at the general election in 1870.

57 *Respondents Concede the Number of Votes Cast in* 1870.

"For the purpose of making this transcript without encumbering the record with a full certified abstract of the votes cast for the several candidates at the general election held on the 1st Tuesday after the 1st Monday in Nov., 1870, it is admitted that the aggregate number of votes cast at said election for governor was 1,508; that the total number of votes cast for the several candidates for Congress was 1,503; that the total number of votes cast for the several candidates for representative in the legislature aggregated 1,490, and that the aggregate votes cast for the remainder of the State and county officers voted for at said election did not exceed those for governer, Congress, and legislature as aforesaid;" which was read without objection.

The relator then offered in evidence the proposition of the county judges, dated Aug. 27, 1879, as follows, to wit:

Proposition of County Court.

The court will issue the $80,000 in bonds as claimed by the r'road company as due them on the contract on record on the following conditions:

When the Q., M. & P. r'road has been continuously and completely ironed and operated from West Quincy to a point 6 miles within Sullivan Co. & a depot & side track built in one half mile of the town of Greencastle, on the line of said road, provided the citizens of said town of Greencastle pay to the said R. R. Co. the sum of

$12,00– in cash or its equivalent & that the entire grading as far as the town of Milan be put under contract, we will issue and deliver to said Co. $20,000 in bonds of said county; and when 6 miles more
58 of the said r'road has been continuously and completely ironed & operated on the line already graded & the r'road completely graded from the east line of said Sullivan Co. to the town of Milan, we will issue and deliver to the said company the sum of $20,000 more in bonds of said county; and when the said r'road has been constructed and continuously & completely ironed & operated from West Quincy to a point one-half mile from the original town of Milan, as designated of record, and depot & side-track built in a half mile of the court-house of Milan, & all completed by the 1st day of Jan., 1880, & the county released from all further liabilities, we will issue and deliver to said company $40,000 more in bonds of said Co.

Aug. 27th, 1879.

A. W. HARRIS,
THOS. McCALLISTER, *Judges.*
JOSHUA GRAY.

Objection by Resp. Sustained.

To the introduction of which the defendants objected, because irrelevant and incompetent; which objection was by the court sustained; to which action of the court the relator at the time excepted.

This was all the evidence offered on the part of either party.

Thereupon the relator moved the court to declare the law as follows:

Instructions.

1st. If from the evidence the court finds that on the 22nd day of December, 1869, the county court of Sullivan county, Missouri, did order a special election to be holden in the several election precincts of said county on the 22nd day of February, 1870, to ascertain the sense of the voters of said county whether said county should subscribe $200,000 to the capital stock of said railroad company upon the conditions in such order prescribed; that in pursuance of said order an election was duly held and the
59 poll books and returns of said election duly canvassed and declared; that 1,049 voters voting at such election voted in favor of the same and 257 voters voted against the same, and that the county court, acting in pursuance of said vote, declared such subscription carried and entered the same upon the stock books of said company, and that said company had continuously surveyed and permanently located its said road from West Quincy, in Marion county, Mo., to the eastern boundary of Sullivan county, and that from such terminal point the said company had, prior to June 29th, 1879, continuously graded, bridged, and tied twelve miles within said county prior to the filing of the petition for the alternative writ

in that cause, then in that event the court declares the law to be that relator is entitled to have and receive from said county the first two installments of bonds mentioned in the contract of subscription, and the peremptory writ must issue.

2nd. The court further declares the law to be that if from the evidence the court believes that an election was ordered by the county court; that such election, on due notice, was lawfully held; that the poll books and election returns were canvassed by the clerk and county judges, and that thereupon and thereafter the county court, acting in the premises, declared that more than two-thirds of the qualified voters of said county had assented to such subscription and made and entered a subscription upon the stock books of the Quincy, Missouri and Pacific Railroad Company in pursuance of such vote, and that thereafter the said company, relying in good faith upon such subscription, substantially completed its road twelve miles within said county on the line contemplated by the order of subscription, then in that event the county is estopped from
60 denying the want of power to issue said bonds, and the judgment of the court must be for the relator and the peremptory writ must issue.

3rd. If from the evidence the court believes that on the 22nd day of Dec., 1869, the county court of Sullivan county did order an election on the 22nd day of Feb'y, 1870, to determine the sense of the qualified voters of said county whether the county court should subscribe $200,000 to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions in such order of subscription contained; that an election was held at such time; that 1,049 voters voted therefor and 257 votes against the same, then the court declares the law to be that 1,049 votes constitutes more than two-thirds of the qualified voters of said county, as required by law, and their assent to such subscription created a valid power in said county court to make such subscription; and if the court further finds that such subscription was actually made thereunder, and that there has been a substantial compliance with such contract or order of subscription prior to the filing of the petition for the alternative writ by the railroad company, then the judgment of the court must be for the relator and the peremptory writ will issue.

4th. Although it is conceded that the registration list of 1868, with the names added by the registration officers at a special registration held Sept. 2nd, 1869, and the subsequent special registration held Feb'y 17th, 1870, for the purposes of such special election, shows a larger number of persons than those voting at such special election, yet such fact is not evidence that they were qualified voters on the 22nd day of February, 1870, unless they actually presented themselves for the purpose of voting at such election and
61 voted or offered to vote, and is insufficient to overthow the presumption that all the qualified voters of said county voted at such special election.

And the court then and there refused to declare the law and to

give instructions as asked; to which action of the court in refusing so to declare the law the relator at the time excepted.

Whereupon the court found for the defendant- and rendered judgment denying the relief prayed.

This November 27, A. D. 1882.

And now, to wit, Nov. 27th, 1882, comes the relator, by its attorneys, and filed its motion for a new trial herein; which said motion is in words and figures following, to wit:

Motion for New Trial.

In the Circuit Court of Sullivan County, Missouri, Nov. Term, 1882.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Relator,
against
ANDERSON W. HARRIS, THOMAS MCCALLISTER, and GEORGE T. TODD, Judges of the Sullivan County Court, Respondents.

Now comes the relator and files this its motion for a new trial—

1. Because the finding and judgment of the court is for the wrong party. It should have been for the relator instead of respondents.

2nd. Because the finding and judgment of the court is against the evidence, against the law, and against the law and evidence.

62 3rd. Because the court admitted improper and illegal evidence on the part of respondents, against the objections of the relator, and excluded proper and legal testimony offered on the part of said relator.

4th. Because the court erred in refusing to declare the law as asked in relator's instructions numbered one (1), two (2), three (3), and four (4).

5th. Because the judicial declarations and ascertainment that more than two-thirds of the qualified voters of said county voted in favor of such subscription conferred a valid power upon the Sullivan county court to make the contract in question; and, the contract of subscription given in evidence having been wholly executed on the part of relator, the court erred in admitting testimony on the part of respondents tending to impeach, impair, vary, or modify the contract in question to the injury of the relator.

6th. Because at the time of the making of the contract in question the supreme court of Missouri, in the cases of The State *ex rel.* Basett *vs.* Renick, mayor of St. Joseph (37 Mo. Rep., 270), State *vs.* Binder (38 Mo. Rep., 450), The State *ex rel.* N. M. C. R. Co. *vs.* Linn Co. (41 Mo. Rep., 504), and other cases, extending from 1864 to 1872, had judicially declared and construed the phrase "two-thirds of the qualified voters of the county, city, or town" to mean the same thing as and was equivalent to "two-thirds of the qualified voters of such county, city, or town voting at an election," &c.; and, such being the judicial interpretation thereof, the legislature of the State of Missouri, in the act approved March 23rd, 1868,

known as the township aid act, adopted the same, and therein used the words "two-thirds of the qualified voters of such town-
63 ship voting at such election" as synonomous with and equivalent to the words used in the constitution and general statutes, and under such author-ative construction the contract in question was made and in good faith executed on the part of the relator company, and the judgment of the court impeaches and impairs the validity of said contract so made and executed. Wherefore the relator says that the judgment of the court is erroneous, in that it is in violation of section 28 of the declaration of rights of the constitution of 1865, and in violation of section 10 of article I of the Constitution of the United States.

JOHN P. BUTLER,
For Relator.

Motion for New Trial Overruled.

Which motion was taken up by agreement, and, being heard and understood, was by the court overruled on the day last aforesaid; to which action and ruling of the court in overruling said motion relator at the time excepted.

And now, to wit, Nov. 27, 1882, come- the relator, by its attorneys, and filed its motion in arrest of judgment herein; which said motion is in words and figures following, to wit:

In the Circuit Court of Sullivan County, Missouri, Nov. Term, 1882.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Relator,
against
64 ANDERSON W. HARRIS, THOMAS MCCALLISTER, and GEORGE T. Todd, Judges of the Sullivan County Court, Respondents.

Motion in Arrest.

Now comes the relator and files this its motion in arrest of judgment—

1st. Because the judgment is for the wrong party and against the law.

2nd. Because the court admitted improper and illegal testimony on the part of respondents and excluded proper and legal testimony on the part of relator.

3rd. Because the court erred in refusing to declare the law as requested by the relator.

4th. Because the court erred in admitting testimony offered on the part of respondents tending to impeach and impair a contract lawfully made and in good faith executed by the relator company.

5th. Because the judgment of the court is erroneous in that it impairs the obligation of contracts.

6th. Because the court erred in overruling the relator's motion for a new trial.

JNO. P. BUTLER,
For Relator.

Motion in Arrest Overruled.

Which motion was taken up by agreement, and, being heard and understood, was by the court overruled on the day last aforesaid; to which action and ruling of the court in overruling said motion relator at the time excepted.

And now, to wit, Nov. 27, 1882, comes the relator and tenders this its bill of exceptions and prays the court that it be signed, sealed, and made part of the record.

Which is accordingly done this 27th day of Nov., 1882.

Given under my hand and seal the day and year aforesaid.

G. D. BURGESS, [SEAL.]
Judge of the 11th Judicial Circuit.

65 STATE OF MISSOURI, } ss:
County of Sullivan, }

I, H. T. McClanahan, clerk of the circuit court within and for the county of Sullivan and State of Missouri, do hereby certify that the above and foregoing is a true copy of the record and proceedings had in the case wherein "The Quincy, Missouri and Pacific Railroad Company was relator and Anderson W. Harris, Thomas McCallister, and Geo. T. Todd, judges of the Sullivan county court, *was* respondents, as full and complete as the same appears of record and on file in my office.

In testimony whereof I, H. T. McClanahan, clerk of the [SEAL.] circuit court in Sullivan county, Missouri, have hereto set my hand and seal this the 16th day of February, 1886.

H. T. McCLANAHAN,
Clerk Cir. C't.

66 And afterwards, to wit, on the 21st day of October, 1887, the following further proceedings were had in the supreme court of Missouri in said cause, to wit:

STATE *ex Rel.* Q., M. & P. R'Y Co., P. E., *vs.* Co. C'T OF SULLIVAN Co., D. E. } Error to Sullivan Co. Cir. C't.

Comes now the said plaintiff in error, by attorney, and suggests a diminution of the record herein and files its motion setting forth the same and asking that a rule of this court issue to the clerk of the said circuit court commanding him to send up to this court a perfect transcript of the record and proceedings of said court in this cause. Ordered that said rule issue as prayed, returnable in 30 days.

Which said motion is in the words and figures as follows, to wit

67 In the Supreme Court of Missouri, October Term, 1887.

THE STATE OF MISSOURI at the Relation and to Use of THE QUINCY, MISSOURI and PACIFIC RAILROAD COMPANY, Plaintiff in Error,

against

ANDREW W. HARRIS, GEORGE T. TODD, and THOMAS MONTGOMERY, Judges of the County Court of Sullivan County, Defendants in Error.

Now, at this day, come the said defendants in error, by attorney, and state to the court that the transcript of the record in said cause on file in this court is incorrect and defective in this:

1. That the part of said transcript, on page 54 thereof, purporting to contain the concession and admission of the counsel for the relator with respect to the registration books and the number of registered and qualified voters of Sullivan county on February 22, 1870, when the special election was held in said county to determine whether or not said county would subscribe $200,000 to the capital stock of the relator company, is as follows:

"Thereupon the defendant began to read from the registration book of Polk township, in said county, used at the special election Feb'y 22, 1870, but before completing the reading thereof counsel for relator conceded that the registration books offered in evidence, counting all those registered for the general election of 1868 and those added in 1869 and those added for special election Feb'y 22, 1870, contained the names of 1,940 duly registered voters in said county at said election, and that said names were placed upon said books by the aforesaid registration officers for use in
68 the general election of 1868, the special election of 1869, and special election held Feb'y 22, 1870."

But that the record in said cause, as appearing in the bill of exceptions therein on file in the office of the clerk of the circuit court of Sullivan county, where said cause was tried, contains said evidence as follows:

"Thereupon the defendant began to read from the registration book of Polk township, in said county, used at the special election Feb'y 22, 1870, but before completing the reading thereof counsel for relator conceded that the registration books offered in evidence, counting all those registered for the general election of 1868 and those added in 1869 and those added for special election Feb'y 22, 1870, contained the names of 1,940 persons qualified to vote in said county at said election, and that said names were placed upon said books by the aforesaid registering officers and their predecessors in office for use in the general election of 1868, the special election of 1869, and special election held Feb'y 22, 1870."

2. That said transcript omits the words contained in the record of said cause—"persons qualified to vote;" which words follow immediately after the statement of the number of voters being 1,940, and in place of said words the following are inserted in said transcript: "Duly registered voters;" and that the wor-s contained in said rec-

ord "and their predecessors in office" are omitted from said transcript.

Wherefore the defendants suggest a diminution of and an addition to the record in said cause as the same has been certified to this court in said transcript, as herein specified; and the defendants therefore pray the court to cause to be issued a writ of
69 certiorari directed to the circuit court of Sullivan county, wherein said cause was tried, directing and requiring said court to certify or cause to be certified to this court the true and perfect record and the whole record in said cause or that part of the record in said cause herein specified, as this court may deem proper.

A. W. MULLINS,
Att'y for Def'ts in Error.

STATE OF MISSOURI, } *ss:*
County of Linn, }

A. W. Mullins, being duly sworn, upon his oath says that he is attorney for defendants in error in said cause, and that he was one of the defendants' attorneys in the trial of said cause in the circuit court wherein said cause was tried, and that the foregoing statements, suggestion, and application are true and correct as related as he verily believes.

A. W. MULLINS.

Subscribed and sworn to before me, a notary public within and for said Linn county. Done at office in Linn, Mo., this 13th day of October, 1887. My term of office expires March 4, 1889.

H. K. WEST,
Notary Public.

[Endorsed:] Suggestion of the diminution of the record and application for certiorari.

Attached to said motion appears the following notice and certificate of service:

70 In the Supreme Court of Missouri, October Term, 1887.

THE STATE *ex Rel.* THE QUINCY, MISSOURI AND PACIFIC R. R. Co., Plaintiff in Error,
against
ANDREW W. HARRIS *et al.*, Judges of the County Court of Sullivan County, Defendants in Error.

To John P. Butler, Esq., attorney for said plaintiff in error:

You are hereby notified that on Tuesday, October 18, 1887, or as soon thereafter as a hearing can be had, an application will be made by and on behalf of the defendants in error in said cause to said supreme court for a writ of certiorari for the purpose of causing to be certified to said court the whole of the record and the true and per-

fect record in said cause relating to the registered and qualified voters of Sullivan county on February 22, 1870.

A. W. MULLINS,
Att'y for Def'ts in Error.

October 13, 1887.

I hereby certify that I served the above notice on the said John P. Butler by delivering to him a true copy thereof.

Done at the city of Milan, in Sullivan county, Missouri, on this 15th day of October, 1887.

Fee, 50 cts.

C. C. JONES,
Sheriff of Sullivan County, Mo.

[Endorsed:] The State *ex rel.* the Quincy, Missouri & Pacific R. R. Co. *vs.* Andrew W. Harris *et al.*, judges of the county court of Sullivan county. Notice.

71 JEFFERSON CITY, MO., *Oct.* 18*th*, 1887.

Mr. John P. Butler, Milan, Mo.

DEAR SIR: Please take notice that on Friday, the 21st of Oct., 1887, that I, as counsel for defendant in error in State *ex rel.* Quincy, Missouri and Pacific R'y, P. E., *vs.* County Court of Sullivan County, D. E., No. 4114, now pending in the supreme court, will suggest the diminution of the transcript of the record, and will make application to the said court for a writ of certiorari to perfect the record in said cause. The diminution suggested relates to the matter which you pointed out to me in the original this morning, and appears to be made on the grounds substantially which you suggested to me. You therefore understand the grounds of the application.

Very resp't., D. H. McINTYRE,
Att'y for D. E.

D. H. McIntyre upon his oath states that on Tuesday, the 18th day of Oct., 1887, he mailed to John P. Butler, an attorney of record for the P. E. in the above-entitled cause, a true copy of the within notice, addressed to said John P. Butler, Esq., at Milan, Sullivan Co., Mo., postage prepaid.

Subscribed and sworn to before me this 21st day of Oct., 1887.

HENRY W. EWING,
Cl'k Sup. C't Mo.

[Endorsed:] Notice of an application — writ of certiorari.

72 And afterwards, to wit, on the 22d day of October, 1887, a writ of certiorari issued out of said court in said cause, which is in the words and figures as follows, to wit:

73 STATE OF MISSOURI, *set:*

The State of Missouri to the clerk of the circuit court of Sullivan county, Greeting:

Whereas it hath been suggested to our supreme court of the State of Missouri that the transcript of the record and proceedings in a certain cause lately pending in the circuit court of Sullivan county, wherein State *ex rel.* Quincy, Mo. & Pacific R'y Co. was plaintiff and County Court of Sullivan County was defendant, and which said cause was brought into our said supreme court on writ of error; is imperfect, insufficient, and diminished; and whereas our said supreme court is satisfied that the said record does not contain a full, true, and complete transcript of the proceedings had in said circuit court of Sullivan county, in that said transcript omits the words "persons qualified to vote," which words follow immediately after the statement of the number of voters, being 1,940, and in place of said words the following are inserted in said transcript: "Duly registered voters;" and that the words contained in said record "and their predecessors in office" are omitted from said transcript:

These are, therefore, to command you, as before you were commanded, that you send up to our said supreme court on or before the 22d in November next, a full, true, and complete transcript of said proceedings, certified under the seal of said circuit court of Sullivan county, so that our said supreme court may proceed to do justice herein between the parties; and have you then and there this writ.

Witness Henry W. Ewing, clerk of the supreme court of Missouri, with the seal of said court hereunto affixed. Done at office in the city of Jefferson, State aforesaid, this 22d day of October, A. D. 1887.

HENRY W. EWING, *Clerk*,
By ROWAN RAY, *D. C.*

74 And afterwards, to wit, on November 3d, 1887, the return of the clerk of the Sullivan county circuit court to said writ was filed, which is in words and figures as follows, to wit:

75 Such judicial construction- impeach and impair the contract in question by overruling and overriding the former decisions of the same court. When contracts have been made and rights become vested by reason of such former decisions and as the effect of the evidence is in a collateral way to impeach and impair the validity of the contract in question, which has in good faith been wholly executed by the relator, such books ought not to be admitted for any such purpose.

Which said several objections were by the court overruled and the said books admitted in evidence; to which action and ruling of the court relator at the time excepted.

Thereupon the defendant began to read from the registration book of Polk township, in said county, used at the special election Feb'y 22, 1870, but before completing the reading thereof counsel for relator conceded that the registration books offered in evidence,

counting all those registered for the general election of 1868 and those added in 1869 and those added for special election Feb'y 22, 1870, contained the names of 1,940 persons as qualified to vote in said county at said election, and that said names were placed upon said books by the aforesaid registering officers and their predecessors in office for use in the general election of 1868, the special election of 1869, and special election held Feb'ry 22, 1870. Upon such concessions being made defendant rested.

In rebuttal, E. M. COLLINS recalled and testified on behalf of relator as follows:

The building of the road—that is, the grading, bridging, and tieing for the first twelve miles in Sullivan county—cost $16,000 per mile; had several conversations with Judge Grigsly, who then was and for some years previous had been sole judge of the county court, and he always said that when the contract was
76 complied with the company should have the books. The preliminary original surveys run three or four miles south of Wintersville.

Cross-examined:

The first permanent survey in which the line was finally established west of Milan was made in 1880. Made several preliminary surveys prior to that time.

EDWARD MCCABE, recalled, testified on behalf of the relator as follows:

I am and have been for quite a number of years general attorney for the Q., M. & P. R. R. Co., and know that the company relied in good faith upon this subscription until after the railroad was completed. No question was ever made or mooted but that two-thirds of the qualified voters of said county had voted in favor of said subscription.

Relator offered in evidence abstract of election returns in said county for 1868, which is as follows, to wit:

In lieu of copying the entire abstract of the votes cast for the several candidates at the general election.

77 STATE OF MISSOURI, } *ss*:
County of Sullivan, }

I, H. T. McClanahan, clerk of the circuit court within and for said county, do hereby certify that the pages numbered 54 & 55, to which this certificate is attached, is a true and perfect copy of the bill of exceptions in the case of The State of Missouri at the relation and to the use of the Quincy, Missouri and Pacific Railroad Company, relator, against Anderson W. Harris *et als.*, respondents, as the same is contained in the original bill of exceptions in said case as now on file in my office, and as the same should have been previously certified in the original record now on file in the supreme

court of Missouri, and I hereby authorize Henry W. Ewing, clerk of the supreme court of the State of Missouri, to substitute pages 54 & 55, hereunto attached, in lieu of original pages 54 & 55 as now contained in said original record. This certificate is made in obedience to writ of certiorari hereto attached, issued out of the supreme court, dated October 22nd, 1887, and herewith returned.

In testimony whereof I have hereunto set my hand and the seal of said court.

Done at office, in the city of Milan, this 31st day of October, A. D. 1887.

H. T. McCLANAHAN,
Clerk Circuit Court.

78 And afterwards, to wit, on the 18th day of April, 1888, the following further proceedings were had in the supreme court of Missouri in said cause, to wit:

STATE *ex Rel.* Q., M. & P. R'Y Co., P. E.,
vs.
COUNTY C'T OF SULLIVAN CO., D. E.

Comes now the said defendant in error, by attorney, and files its motion and affidavit for order requiring clerk of the Sullivan county circuit court to send up to this court the original bill of exceptions herein; which said motion is in the words and figures as follows, to wit:

79 In the Supreme Court of Missouri, April Term, 1888.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Plaintiff in Error,
against.
ANDREW W. HARRIS, GEORGE T. TODD, and THOMAS MONTGOMERY, Judges of the County Court of Sullivan County, Defendants in Error.

Now, at this day, come the said defendants, by attorney, and move the court to order and require the clerk of the circuit court of Sullivan county, Missouri, to send up forthwith to this court the original bill of exceptions on file (with the other papers in said cause) in the office of said clerk for the reasons following, to wit:

1. Because the original transcript of the record in said cause, as made and forwarded by the clerk of said circuit court to the clerk of this court, was and is imperfect and incorrect with respect to the evidence showing the number of registered qualified voters in Sullivan county, contained on page 54 thereof, as shown in the application for a writ of certiorari heretofore made to this court, and upon which application the writ of certiorari was granted.

2. Because the transcript of the record made and returned by said clerk of the circuit court in obedience to said writ of certiorari is incorrect with respect to a part of the evidence on page 57 thereof relat-

ing to the number of registered qualified voters in said Sullivan
80 county (upon which page the same evidence that was inaccurately copied on page 54 of the original transcript was attempted to be set forth), in this: That next after the word "persons" there is inserted a comma and the word "as," so that said part of said transcript reads: "The registration books offered in evidence * * * contained the names of 1,940 persons, as qualified to vote in said county at said election," when the said bill of exceptions, with respect to said evidence, reads as follows: "The registration books offered in evidence * * * contained the names of 1,940 persons qualified *ti* vote in said county at said election."

3. Because, while the amended transcript forwarded in obedience to said writ of certiorari corrects the inaccuracies and mistakes contained in the original transcript with respect to said part of the record, yet the change made by the punctuation mark and the word inserted, as stated above, in said amended transcript, obviously affects the admission and concession with respect to the evidence as contained in the original bill of exceptions in said cause, and that an inspection of said bill of exceptions will disclose the inaccuracy and error contained in said amended transcript as herein set forth.

A. W. MULLINS,
Attorney for Defendant in Error.

[Endorsed:] Motion for rule on the clerk of the circuit court of Sullivan Co. to send up original bill of exceptions.

STATE OF MISSOURI, } ss:
County of Linn, }

A. W. Mullins, attorney for the defendant in the above-entitled cause, makes oath and states that the matter and things as stated in the foregoing motion are true as he verily believes.

A. W. MULLINS.

81 Subscribed and sworn to before me, a notary public within and for the county aforesaid. Done at office in Linneus, Mo., this 16th day of April, 1888. My term expires Sept. 7, 1891.

GEO. W. STEPHENS,
Notary Public, Linn Co., Mo.

Attached to said motion appears the following affidavit, to wit:

82 In the Supreme Court, April Term, 1888.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Plaintiff in Error,

against

ANDREW W. HARRIS, GEORGE T. TODD, and THOMAS MONTGOMERY, Judges of the County Court of Sullivan County, Defendants in Error.

Now comes the plaintiff in error, — attorney, and for answer and

reason why the motion for a rule on the circuit clerk of Sullivan county to send up the original bill of exceptions should not be granted says that the first cause or reason alleged in said motion is not true.

That the second reason assigned by the defendant in error is not true in any part or particular.

That the third reason given by the defendant in error is not true in manner and form or otherwise as alleged in said motion.

The plaintiff in error says that the amended transcript herein was filed on the 16 day of Jan'y, 1888; that since the filing of said transcript the said defendant in error has filed his brief in this cause and the same is now at issue.

That this cause was set down for trial in this court on the 20 day of April, 1888, and the motion now made was made without notice and filed herein on the 18 day of April, 1888.

83 And for further affirmative reason why said motion should not be granted John P. Butler, for the plaintiff in error, being sworn, upon his oath says that he was one of the attorneys for the relator company and assisted in the trial of said cause in the circuit court of Sullivan county.

That the bill of exceptions as certified by H. T. McClanahan, clerk of the circuit court of Sullivan county, under his certificate attached to the amended transcript filed herein Jan'y 16, 1888, are true and correct, and have been in nowise changed or altered since the making and the signing thereof by the judge of that court.

That attached to the amended transcript is a true and perfect photographic copy of the original bill of exceptions in this case, and certified by the clerk of said court to be correct, which he attaches as "Exhibit A" to such amended transcript, and this affiant says that the said photographic copy so attached by said clerk is a true and perfect copy of the said original bill of exceptions so far as disputed.

Affiant therefore says that the said motion, if granted, would only work delay without reason and should not be entertained.

But affiant says that the plaintiff in error entertains no objection to this court personally inspecting the original bill of exceptions, provided that no delay in the hearing and decision of this case upon the merits thereof be occasioned thereby.

JNO. P. BUTLER,
Att'y for Plaintiff in Error.

[Endorsed:] Affidavit in opposition to motion for rule on clerk. Filed April 18, 1888.

84 STATE OF MISSOURI, } ss:
Cole County, }

Jno. P. Butler, attorney for the plaintiff in error, being sworn, upon his oath says that the statements made in the foregoing are true and correct.

JNO. P. BUTLER.

Subscribed and sworn to before me this 20 day of April, 1888.
H. W. EWING, *Clerk*,
By ROWAN RAY, *D. C.*

85 And afterwards, to wit, on the 20th day of April, 1888, an assignment of errors was filed in said cause, which is in the words and figures as follows, to wit:

THE STATE *ex Rel.* Q., M. & P. R. R. Co., Pl'ff in Error,
vs.
A. W. HARRIS *et al.*, Def'ts in Error.

And now comes the said pl'ff in error and says that in the record and proceedings of the court below in the above-entitled cause there is manifest error, and for error said pl'ff in error assigns the following, to wit:

Assignment of Errors.

I.

The court below erred in permitting the respondents to read in evidence, against the objections of the relator, the registration books used at the general election of 1868 and the subsequent special elections held in the years 1869 and 1870.

II.

The court below erred in refusing to declare the law as requested by the relator in its instructions numbered one, two, three, and four.

III.

The court below erred in rendering judgment in favor of the respondents. The judgment should have been in favor of the relator and the peremptory writ issued.

IV.

The judgment of the court below is erroneous in that it impeaches, impairs, and invalidates the contract of subscription lawfully made between Sullivan county and the relator company, and therein is in violation of the rights of relator under section 10 of article I of the Constitution of the United States.

V.

The court below erred in overruling relator's motion for a new trial and in arrest of judgment and in refusing such new trial or to arrest the judgment therein.

JOHN P. BUTLER,
Att'y for Pl'ff in Error.

86 And now come the defendant- in error and for joinder in error say there is no error in the record and proceedings of said circuit court in said cause, as assigned by said plaintiff in error.

And on the same day, to wit, the 20th day of April, 1888, the following further proceedings were had in said cause, to wit:

STATE *ex Rel.* Q., M. & P. R'Y Co., P. E., }
vs.
COUNTY C'T OF SULLIVAN Co., D. E. }

Now, at this day, on motion of said plaintiff in error, by attorney, it is ordered that an amended return at this time presented to the court be substituted for return heretofore filed and cause passed; which said amended return is in the words and figures as follows, to wit:

87 STATE OF MISSOURI, }
County of Sullivan, } *ss*:

Pleas before the circuit court of Sullivan county and State aforesaid on the — day of ——, 188–, before the Hon. Gavon D. Burgess, judge of the eleventh judicial circuit of the State of Missouri.

Order for Writ of Mandamus.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILWAY COMPANY, Relator,
against
ANDERSON W. HARRIS, THOMAS MONTGOMERY, and GEO. T. TODD, Judges of the Sullivan County Court, Respondent-.

Be it remembered that heretofore, to wit, on the 7th day of April, 1881, a petition was filed in the circuit court aforesaid in the above-entitled cause praying that an alternative writ of mandamus issue against the respondents because of the matters and things alleged in relator's petition. Whereupon the circuit court aforesaid made and caused to be entered of record an order of said court in words and figures following, to wit:

THE STATE OF MISSOURI at the Relation of THE QUINCY, MISSOURI & PACIFIC RAILROAD COMPANY, Pl't'ff,
against
A. W. HARRIS, THOMAS MONTGOMERY, and GEO. T. TODD, Judges of the County Court of Sullivan County, Missouri, Def'ts.

88 *Order Filing Petition for Mandamus.*

Now, at this day, comes the relator, by its attorney, Edward McCabe, and files herein its petition praying for an alternative writ of mandamus against said county judges, the above-named defendants, A. W. Harris, Thomas Montgomery, and George T. Todd, and which petition having been heard by the court, it is ordered by the court that said alternative writ of mandamus be issued and directed to the county court justices aforesaid, to wit, A. W. Harris, Thomas Montgomery, and George T. Todd, returnable to this court on the first day of the next regular term thereof, to be begun and held at

the court-house, in the city of Milan, in said Sullivan county, Missouri, on Monday, the 21st day of November next, and then and there good cause show why such alternative writ of mandamus should not be made peremptory; and the said defendants to be served with a copy of this alternative writ of mandamus and the order of this court.

And thereupon and thereafter, viz., on the 10th day of August, 1881, a copy of said order of summons, together with a certified copy of the alternative writ of mandamus issued by the said court, was delivered to the sheriff of said county of Sullivan, which was returned executed on the 16th day of September 1881.

And afterwards, to wit, at the May term, May 15th, 1882, an amended alternative writ of mandamus was issued in the said cause, which is in words and figures following, viz:

STATE OF MISSOURI, } ss:
Sullivan County, }

In the Circuit Court of Sullivan County, Missouri, May Term, 1882.

89 *Alternative Writ of Mandamus.*

The State of Missouri at the relation of the Quincy, Missouri and Pacific Railroad Company to Anderson W. Harris, Thomas Montgomery, and George T. Todd, judges of the county court of Sullivan county, Missouri:

Whereas it has been represented to the judge of this court, at Milan, in Sullivan county aforesaid, that on the 29th day of June, 1869, the Quincy, Missouri and Pacific Railroad Company was, ever since has been, and now is a corporation organized and existing under the general laws of the State of Missouri; that on the 22nd day of December, 1869, the relators, the said railroad company, was engaged in the work of constructing its line of railroad through the State of Missouri from a point on the Mississippi river opposite the city of Quincy, in the State of Illinois, in Marion county, Missouri, to a point on the Missouri river, in Atchison county, Missouri, opposite the city of Brownsville, Nebraska; and the said relator being desirous of constructing its road-bed through the county of Sullivan aforesaid, and the said county of Sullivan, in its municipal capacity, being desirous of assisting the relator in the prosecution and completion of said work, by way of subscribing to the capital stock of said railroad company, the county court of said Sullivan county, on the day last aforesaid, did order an election to be held at the usual and various voting places in said county as then established by law, on the 22nd day of February, 1870, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan would assent to a subscription in the sum of $200,000 to the capital stock of the relator, subject to the following conditions—that is to say, said railroad to be located and constructed through said
90 Sullivan county from east to west on a line as near through the center of said county as practicable, said subscription to

be paid to said company, the relator, in the bonds of said county at par, said bonds to bear interest at the rate of seven per centum per annum, interest payable annually, to bear date the day of their issue, and to become due and payable 20 years after the date thereof, "provided that the county court of said county might at its election provide for and pay off ten per centum of the principal of said bonds each year after the elapse of ten years from the date of issue thereof, and might provide in said bonds for such payment of principal."

That whenever the relator, the said railroad company, should have surveyed and permanently located said road continuously through the State of Missouri from West Quincy, in Marion county, in said State, to some point on the Missouri river opposite or near Brownsville, in the State of Nebraska, and should have continuously graded, bridged, and tied six miles of said railroad within Sullivan county aforesaid, upon the line then and thereafter designated, then the said county of Sullivan, by its county court aforesaid, would issue and deliver to the relator, the said railroad company, its bonds in payment of such subscription to the amount of $40,000, and for each additional section of six miles so continuously graded, bridged, and tied within said county of Sullivan said county would issue and deliver to the said relator an additional sum of $40,000 in the bonds of said county as aforesaid until the whole subscription of $200,000 should be paid up, provided that the last installment of said subscription of $200,000 should not be paid to the relator until the relator's railroad should be completely and continuously graded,
91 bridged, and tied from eastern boundary of said county to the western boundery of the same; and it being further ordered that at said special election to be held as aforesaid, and at the places aforesaid, all persons voting for such proposed subscription should have written or printed on their ballots "Shall Sullivan county, in the State of Missouri, subscribe $200,000 to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions and limitations provided in an order of the county court of said county made at its December term, 1869, entitled railroad order?" "Yes," and those voting against such subscription the words "Shall Sullivan county, in the State of Missouri, subscribe to the capital stock of the Quincy, Missouri and Pacific Railroad Company the sum of two hundred thousand dollars upon the stipulations, limitations, and conditions prescribed in the order of the county court of said county made at its December term, 1869, entitled railroad order?" "No."

And that it was further ordered that 20 days' notice of such special election should be given by the sheriff of said county of Sullivan by causing to be published a copy of said order (the same hereinabove recited) in the "Weekly North Missouri Herald," and by posting at least 3 copies of said recited order in each municipal township in said county of Sullivan 20 days prior to said election day, and that the clerk of the said county court was there ordered to furnish the sheriff of said county a copy of said election order, which was accordingly done by said clerk; that said notices was

published in said newspaper in accordance with said order, and the said sheriff posted up and caused to be posted up in each municipal township of said county, at least 20 days before the day on
92 which said election was to be held, at least 3 copies of said order by which the voters as aforesaid were authorized to vote on such proposition; that in pursuance of law then in force a special registrations of the qualified voters of said county who had become such since the last general registration and subsequent special registrations of the qualified voters of said county prior thereto was had and held in the various municipal townships in said county prior to the holding of such special election; that said election was had and held at the time and at the places in the said order and notices specified, and that the returns of said special election *was* made out and duly certified to the clerk of the county court of said county by the several judges and clerks of elections in various voting precincts of said county on the 23rd day of February, 1870, and the said county clerk, then and there calling to his assistance the three judges of the county court then in session, canvassed and computed the votes which had been given and cast for and against said subscription and ascertained from said returns that 1,049 voters had voted in favor of the proposition submitted by said order and in favor of subscribing $200,000 to the capital stock of the said relator on the terms in said order set forth, and that 257 voters had voted against the same; that after the said returns had been canvassed of said special election as aforesaid the said county court caused to be placed upon the records thereof the following:

STATE OF MISSOURI, } *ss:*
County of Sullivan, }

Now, at this day, February 23rd, 1870, the poll books for the special election held in the county of Sullivan and State of
93 Missouri at the various election precincts thereof on the 22 day of February, 1870, as presented to the county court, are examined and counted and the following found to be the vote cast, to wit: "Shall Sullivan county, in the State of Missouri, subscribe $200,000 to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions and limitations provided in an order of the county court of said county made at its December term, 1869, entitled railroad order?" yes, 1,049 votes; no, 257 votes.

That the said county court, after said canvass and returns and ascertainment of said votes, and in order to give effect to the will of the people of said county, more than two-thirds of the qualified voters of said county having at such special election assented thereto, made an order of record authorizing and instructing the then president and presiding justice of said county court, James Beatty, Esq., and the then clerk of said court, Jno. Q. Boner, Esq., to make and enter said subscription in the stock books of the relator, The Quincy, Missouri and Pacific Railroad Company; that the said presiding justice and the said clerk afterward, to wit, on the 5th day of April, 1871, in accordance with the terms of said

order, did subscribe the sum of $200,000 to the capital stock of the relator, payable in the bonds of said county, as specified in said election order; that the said court placed and caused to be placed on the records thereof its order in words and figures as follows, "The same which were used in subscribing to the capital stock of the relator:"

STATE OF MISSOURI, } ss:
County of Sullivan, }

Whereas Sullivan county has voted in favor of said county
94 subscribing $200,000 to the capital stock of the Quincy, Missouri and Pacific Railroad Company, therefore be it ordered that the president and clerk of the county court of said county of Sullivan be, and are hereby, authorized to enter said subscription on the stock books of said company, and also upon the records of this court, upon the conditions contained in and expressed in an order rendered by said county court at its December term, 1869: Now, therefore, I, James Beatty, presiding justice of the Sullivan county court, in pursuance and by the authority in me vested by said order, duly authorizing, directing, and empowering me so to do, have and do hereby enter in the stock books of the Quincy, Missouri and Pacific Railroad Company and in the name of and for said county of Sullivan do hereby subscribe for and take $200,000 of the capital stock of said Quincy, Missouri and Pacific Railroad Company, subject, however, and expressly taken upon the conditions set forth in the order of this court made the 22nd day of December, 1869, as copied in this entry, for the protection and safety of said county in said stock and subscription hereby made.

Given under my hand this April 5th, 1871.

(Signed) JAMES BEATTY,
Ex Officio President of the Sullivan County Court.

[Seal of Sullivan County Court.]

Attest: JNO. Q. BONER,
Clerk Sullivan County Court.

That the capital stock of the relator, as fixed and limited by its charter or articles of association, is six millions of dollars, divided into shares of $100.00 each, and that at the date of said subscription but a small portion of the entire capital stock had been subscribed; that the articles of association of the relator, The Quincy,
95 Missouri and Pacific Railroad Company, were filed in the office of the secretary of state on the 29th day of June, 1869, and that within two years thereafter said company began the construction of its road as aforesaid, and within one year after the commencement of the construction of its said railroad had expended more than the sum of $600,000 thereon; that after the 29th day of June, 1869, and before the 29th day of June, 1879, the relator had surveyed and permanently located its said railroad continuously through the State of Missouri from West Quincy, in Marion county,

in said State, to a point on the Missouri river, in Atchison county, Missouri, opposite the city of Brownsville, in the State of Nebraska, or as nearly opposite thereto as practicable; that after the commencement of the work as aforesaid the building of said line of railroad was pushed rapidly forward until *on* or about the month of October, 1873, at which last said date said railroad had been completed, ironed, and put in operation to the town of Kirksville, in the county of Adair, in the State of Missouri, when the said company were compelled by reason of financial embarassments to temporarily suspend the further construction of its said railroad until *on* or about the month of November, 1876, when the construction of said railroad on the line hereinbefore designated westward from said town of Kirksville was recommenced.

That on and prior to the 29th day of June, 1879, the relator, the said railroad company, had constructed and was operating its line of railroad from West Quincy aforesaid to a point about 16 miles west of said town of Kirksville, and from such terminal operating point had continuously constructed its road-bed, bridges, and superstructure to the eastern bound-ry line of Sullivan county aforesaid, and from the last-named point long prior to the date
96 last aforesaid had continuously graded, bridged, and tied two sections of six miles each—in all twelve miles—within the limits of Sullivan county aforesaid, from said eastern boundary of said county in a westerly direction through the said county and upon the line designated at the time of making said subscription.

That the said relator, on the — day of ——, 1879, and on divers other days and times before and since said day, has offered to show to said county court of Sullivan county and the said judges that it had performed its undertakings as above set forth, and to the extent as above named, so as to entitle the relator to have and receive from the said county court and from the said judges, on behalf of said county, two installments of bonds of forty thousand dollars each, or eighty thousand in bonds of said county, in payment for so much stock subscribed as aforesaid and purchased by said county and agreed to be paid for in bonds; that the relator then, theretofore, and thereafter tendered to said court and the said judges certificates of stock in the capital stock of said company to the amount aforesaid and demanded bonds to the amount aforesaid, viz., in the amount of $80,000, of the said county and of the said judges, but the said judges and the said county court declined to hear any proof of the performance of the conditons on the part of relator entitling it to have and receive the said $80,000 in bonds and failed and refused to accept certificates of stocks in the said company in the said amount, and refused and failed and declined to issue to the relator the said $80,000 in bonds or any part or portion thereof, and the said judges and the said county court of Sullivan county, composed of the judges aforesaid, refused and failed and still refuse and fail to issue and deliver to the relator the said bonds or any part thereof.

97 That by reason of the said alleged wrongful and illegal acts of the said judges as above set forth the relator has

been and is deprived of the said bonds, and is illegally and wrongfully kept out of them, and that relator is entirely without remedy except it be afforded by writ of mandamus.

We, therefore, being willing that due and speedy justice be done to the said relator, The Quincy, Missouri and Pacific Railroad Company, in this behalf command you that, immediately after the receipt of this writ, you do, without further excuse or delay, deliver or cause to be delivered to the relator $80,000 in the bonds of said county of Sullivan in payment for so much stock heretofore subscribed, the bonds to be in the usual form of railroad bonds and to bear interest from date at the rate of 7 per centum per annum, payable annually, to bear date of the day of their issue and to become due and payable 20 years after their date: Provided, however, that you may at your election provide for and pay off ten per cent. of the principal of said bonds each year after 10 years shall have elapsed from the date of the same; and provided also that you may provide in said bonds for such payment of principal or signify to us cause to the contrary, lest in your default complaint should come to us again, and that you are to certify full and perfect obedience to and due execution of this writ to the said circuit court for the eleventh judicial circuit, in the State of Missouri, now setting at Milan, in the said county of Sullivan, on the 15th day of May, A. D. 1882.

Herein fail not at your peril, and have then and there this writ.

Witness the judge of said circuit court for the eleventh
98 judicial circuit aforesaid, at Milan, the 15th day of May, 1882.

G. D. BURGESS,
Judge Circuit Court of Sullivan Co., Mo.

And afterwards, to wit, on the 19th day of May, 1882, the respondents filed their answer and return to the amended alternative writ so issued, which is in words and figures following, to wit:

Answer to Alternative Writ.

In the Circuit Court of Sullivan County, Missouri, May Term, 1882.

THE STATE OF MISSOURI at the Relation of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY
against
ANDERSON W. HARRIS, THOMAS MONTGOMERY, and GEO. T. TODD, Justices of the County Court of Sullivan County, Missouri, Respondents.

Now, at this day, comes the respondents, by attorney, and for return to the alternative writ in said cause say that they deny each and every allegation therein contained, except it be herein expressly admitted.

1st. Respondents admit that they are the justices of the county court of said county.

II. Respondents say that as to whether the Quincy, Missouri and Pacific Railroad Company is a corporation organized and existing under the laws of the State of Missouri they have no knowledge or information sufficient to form a belief, and ask that strict proof thereof be required.

III. Respondents state that as to whether the relator, in the year 1869 or at any other time, was engaged in the construction of a railroad from a point on the Mississippi river opposite the city
99 of Quincy, in the State of Illinois, in Marion county, Missouri, to a point on the Missouri river in Atchison county, Missouri, opposite the city of Brownsville, in the State of Nebraska, they have no knowledge or information sufficient to form a belief, and ask that strict proof thereof be required.

IV. Respondents state that as to whether the county court of said county did order a special election to be held at the usual and various voting places in said county as then established by law, on the 22nd day of February, 1870, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan would assent to a subscription of two hundred thousand dollars to the capital stock of relator upon any condition whatever, they have no knowledge or information sufficient to form a belief, and they ask that strict proof thereof be required.

V. Respondents deny that there was any special registration of the qualified voters of said county who had become such since the last general registration, and subsequent special registration of the qualified voters of said county prior thereto was had and held in the various municipal townships in said county prior to the holding of such special election, as alleged in the alternative writ.

VI. Respondents deny that any notice was ever given that a special election would be held for the purposes mentioned in the alternative writ, either by posting three copies of the order therein mentioned in each municipal township in said county or in any of said townships, or that any copy of such order was ever published in the Weekly North Missouri Herald or any other newspaper.
100 VII. Respondents deny that any returns of any special election, as *eleged* in the alternative writ, were ever made to the clerk of the county court of said county on the 23d day of February, 1870, or at any other time.

VIII. Respondents deny that the clerk of said county called to his assistance the three judges of the county court of said county and canvassed and computed the votes which had been given and cast in the various townships of said county for and against any subscription to the capital stock of relator, as alleged in the alternative writ, on the 23d day of February, 1870, or at any other time.

IX. Respondents deny that one thousand and forty-nine voters voted in favor of the subscription of two hundred thousand dollars to the capital stock of relator as alleged in the alternative writ, or that two hundred and fifty-seven voters voted against such subscription as alleged in the alternative writ.

X. Respondents deny that one thousand and forty-nine voters were two-thirds of the qualified voters of said county.

XI. Respondents deny that the county court of said county, on the 23d day of February, 1870, made any order to the effect that one thousand and forty-nine voters had voted for the proposition to subscribe two hundred thousand dollars to the capital stock of relator, and that two hundred and fifty-seven voters had voted against such proposition, as alleged in the alternative writ.

XII. Respondents deny that there were any judges of election appointed to hold the special election in the respective voting precincts in said county.

XIII. Respondents deny that Sullivan county, Missouri,
101 ever at any time made a subscription of two hundred thousand dollars to the capital stock of relator.

XIV. Respondents state that as to whether the relator located its line of railway between West Quincy, in Marion county, Missouri, and a point in Atchison county, Missouri, opposite the city of Brownsville, in the State of Nebraska, they have no knowledge or information sufficient to form a belief, and ask that strict proof thereof be required.

XV. Respondents deny that the relator ever at any time built its line of railroad through Sullivan county, Missouri, from east to west on a line near the center of said county or in any manner whatever constructed its line of railroad as prescribed in the alleged order of subscription set out in the alternative writ.

XVI. Respondents state that more than five years elapsed between the date of the alleged subscription and the alleged performance of the work as set out in the alternative writ.

XVII. Respondents deny that the relator ever at any time made proof that said alleged contract had been complied — or that respondents should be required to issue the bonds as required in said alternative writ.

Wherefore respondents, having made full return to the conditional writ in this cause, ask that they be discharged with their costs in this behalf.

S. F. LINN,
Prosecuting Att'y for Sullivan County, Mo.
L. T. HATFIELD,
Special Counsel.

102 And afterwards, at the November term and on the 25th day of Nov., 1882, there was filed a reply herein, which is in words and figures following, to wit:

In the Circuit Court of Sullivan County, Missouri, Nov. Term, 1882.

THE STATE OF MISSOURI at the Relation and to the Use of THE Q., M. & P. R. R. Co., Relator,
against
A. W. HARRIS, THOMAS MONTGOMERY, and GEORGE T. TODD, Judges of the County Court of Sullivan County, Mo.

Now comes the relator and for denial of respondents' return says that such return is insufficient in law to constitute a sufficient re-

turn to the alternative writ, and, further, that it is not true, as alleged in return of defendants, other than as stated in relator's petition and the alternative writ.

McCABE & BUTLER,
For Relator.

And afterwards, to wit, at the November term and on the 27 day of November, 1882, the following other proceedings were had, to wit:

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Relator,
against
ANDERSON W. HARRIS, THOMAS MONTGOMERY, and GEORGE T. TODD, Judges of the Sullivan County Court, Respondents.

Judgment of Court.

Now, to wit, November 27, 1882, the application of the relator for the issue of a peremptory writ of mandamus herein
103 comes on for final hearing and determination upon the allegation of the alternative writ of mandamus, heretofore issued herein, the denial of the allegations therein on the part of respondents, and the replication on the part of relator. The relator appearing by its attorneys and as well also the respondents by their attorneys and the respective parties answering ready for trial, the court proceeds to hear the testimony offered on the part of the relator and as well also the evidence on the part of the respondents, and the court, being advised as to the law and fact arising thereupon, doth find that the contract of subscription between Sullivan county, Missouri, and the relator company was made substantially in manner and form as alleged in the allegation of the alternative writ. The court further finds from the evidence that prior to the 29th day of June, 1879, and prior to the filing of the petition for the alternative writ of mandamus herein, the relator's company had substantially complied with the conditions of said contract of subscription by the completion of said railway according to the terms thereof.

The court further finds from the evidence that there were 1,306 votes cast at the special election held in said county to determine the sense of the voters as to whether the county court should or should not make said subscription; that 1,049 votes were cast in favor of said subscription and 257 votes against the same; that more than two-thirds of the qualified voters of said county voting at such election voted in favor of such subscription, but the court further finds from the registration books of said county offered in evidence that there were 1,940 persons duly registered as qualified voters in said county at the time of said election.

104 Wherefore the court finds, adjudges, and decrees that two-thirds of the qualified voters of said county did not vote in favor of such subscription, and that by reason thereof there was a

want of a valid power existing in the county court of said county to make the contract of subscription in question.

It is therefore considered, adjudged, and decreed by the court here that the relator's application for a peremptory writ of mandamus be denied, that the alternative writ issued herein be dismissed, that the respondents go hence without day, and that they have and recover from the relator's company their costs in this suit laid out and expended, taxed at the sum of — dollars and — cents, and that they have execution therefor.

And afterwards, to wit, at the same term, Nov. 27, 1882, the following further proceedings were had, to wit:

Motion for New Trial. Order Overruling Same.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Relator,
against
A. W. HARRISS, THOMAS MONTGOMERY, and GEO. T. TODD, Judges of the Sullivan County Court, Respondents.

Now, on this 27 day of November, 1882, comes the plaintiff, by its attorney, and with leave files herein its motion for a new trial, and by agreement of parties the motion for a new trial was taken up, seen, and, being understood, is by the court overruled.

And afterwards, to wit, at the same term of the court last aforesaid, and on the 27 day of November, 1882, the following proceedings were had, to wit:

105 *Motion in Arrest & Order Overruling Same.*

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI & PACIFIC RAILROAD COMPANY, Relator,
against
A. W. HARRISS, THOMAS MONTGOMERY, and GEORGE T. TODD, Judges of the Sullivan County Court, Respondents.

Now, on this 27th day of November, 1882, comes the plaintiff, by its attorneys, and, with leave of court, files motion in arrest of judgment, and by agreement of parties motion in arrest was taken up, and, being seen and fully understood, is by the court overruled.

And afterwards, to wit, at the same term, on the 27th day of November, 1882, and at the November term of said court, the following further proceedings were had in said cause, to wit:

Order Filing Bill of Exceptions.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Relator,
against
A. W. HARRISS, THOMAS MONTGOMERY, and GEORGE T. TODD, Judges of the County Court of Sullivan Co., Mo., Respondents.

Now, on the 27th day of November, 1882, comes the plaintiff, by its attorneys, and, with leave of court, filed herein its bill of exceptions.

Which said bill of exceptions is in words and figures following, to wit:

In the Circuit Court of Sullivan County, Missouri, November Term, 1882.

STATE OF MISSOURI *ex Rel.* QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY
against
A. W. HARRISS *et al.*

106 Be it remembered that in the progress of the trial of this cause the relator, to sustain the issues on its part, offered the following evidence, to wit:

"The articles of association of the Quincy, Missouri and Pacific Railroad Company, dated June 29th, 1869."

Which said articles of association are in words and figures as follows, to wit:

Articles of Associations.

These articles of association, made and entered into this twenty-fo-rth day of June, A. D. eighteen hundred and sixty-nine, under and *and* by virtue and in pursuance of an act passed by the General Assembly of the State of Missouri entitled "An act concerning private corporations," chapter- sixty-nine and seventy, approved the nineteenth of March, A. D. eighteen hundred and sixty-six, and in accordance with the provisions of chapters sixty-two and sixty-three of the General Statutes of the State of Missouri of eighteen hundred and sixty-five and all subsequent amendments to the acts aforesaid, make and form ourselves into a company for the purpose of construction, maintaining, and operating a railroad for public use in the conveyance of persons and property within the limits of the counties of Marion, Lewis, Knox, Adair, Sullivan, Grundy, Harrison, Gentry, Nodaway, and Atchison, in the State of Missouri.

The said railroad to be constructed, maintained, and operated from the west end of the Quincy railroad bridge or from a point near the same on the west bank of the Mississippi river, in Marion

county, in the State of Missouri, opposite the city of Quincy, in the State of Illinois, on the most practicable and feasible route
107 to and by way of Edina, in Knox county, and to and by way of Kirksville, in Adair county, to a point in Atchison county, on the Missouri river, opposite the city of Brownsville, in the State of Nebraska, the length of said railroad being, as near as can be estimated by the present survey, about two hundred and thirty miles.

The name and style of the company hereby formed is "The Quincy, Missouri and Pacific Railroad Company," and under that name and style shall continue to exist for the term of one thousand years from this date.

The capital stock of said company is hereby fixed at the sum of six millions ($6,000,000) of dollars and is divided into sixty thousand shares of one hundred dollars each.

The following-named persons, being a portion of those whose names are hereunto subscribed, to wit:

John Winterbottom, of Knox county, Missouri;
W. C. Hillis, of Knox county, Missouri;
C. A. Savage, of Quincy, Illinois;
Thomas Jasper, of Quincy, Illinois;
Thomas Redmond, of Quincy, Illinois;
George Adams, of Quincy, Illinois;
C. H. Bull, of Quincy, Illinois;
T. R. Selmers, of Quincy, Illinois;
C. M. Pomroy, of Quincy, Illinois;
James M. De France, of Adair county, Missouri;
M. G. Roseberry, of Nodaway county, Missouri;
A. W. Morgan, of Brownsville, Nebraska;
John Wood, of Quincy, Illinois;

are here named and appointed to be the directors of the
108 company, and do in that capacity consent to take upon themselves to manage the affairs of the company for the first year and until other directors are chosen in their places, in pursuance of the acts hereinbefore mentioned.

In witness whereof and under the authority of the said acts and for the purpose hereinbefore stated we, the undersigned, have hereunto subscribed our respective names and places of residence and have set opposite our respective names the number of shares of one hundred dollars each we do hereby subscribe to the capital stock of the company.

109 Names.	Place of residence.	No. of shares.
C. A. Savage	Quincy, Illinois	Two hundred shares.
Thomas Jasper	Quincy, Illinois	Two hundred shares.
T. R. Selus	Quincy, Illinois	Two hundred shares.
C. M. Pomroy	Quincy, Illinois	Two hundred shares.
Thomas Redmond, by his att'y, Geo. S. King	Quincy, Illinois	Two hundred shares.
Geo. Adams	Quincy, Illinois	Two hundred shares.
John Wood, by his attorney, Geo. Adams	Quincy, Illinois	Two hundred shares.
L. & C. H. Bull	Quincy, Illinois	Two hundred shares.
William C. Bryant	Knox county, Missouri	Two shares (2).
S. H. Agnew	Knox county, Missouri	Five shares (5).
Wm. Harvy	Knox county, Missouri	Two shares (2).
R. R. Wilson	Knox county, Missouri	One share (1).
James F. Bigerstaff	Knox county, Missouri	Five shares (5).
Jacob Pugh	Knox county, Missouri	Five shares (5).
James Cody	Knox county, Missouri	Three shares (3).
W H. Mother	Knox county, Missouri	One share (1).
Henry M. Gonigle	Knox county, Missouri	One share (1).
T. J Lycan	Knox county, Missouri	Five shares (5).
A. P. White	Knox county, Missouri	One share (1).
John Dougherty	Knox county, Missouri	Five shares (5).
Thomas P. Pickins	Knox county, Missouri	One share (1).
Edward Ferrier	Knox county, Missouri	Five shares (5).
John A. Stander	Knox county, Missouri	One share (1).
R. R. Smith	Knox county, Missouri	Three shares (3).
J. W. McBride	Knox county, Missouri	Two shares (2).
110 Warner Pratt	Knox county, Missouri	Ten shares (10).
Jacob Bishoff	Knox county, Missouri	One share (1).
J. P. Finch	Knox county, Missouri	One share (1).
N. B. Coulson	Knox county, Missouri	One share (1).
R. M. Bigerstaff	Knox county, Missouri	Two shares (2).
George R. Porter	Knox county, Missouri	One share (1).
John Fox	Knox county, Missouri	Four shares (4).
Henry Mason	Knox county, Missouri	One share (1).
James G. Agnew	Knox county, Missouri	Five shares (5).
W. C. Hallister	Knox county, Missouri	One share (1).
Lorenzo Ighurst	Knox county, Missouri	One share (1).
John Thralls	Knox county, Missouri	One share (1).
James C. Blood	Knox county, Missouri	One share (1).
Peter Early, Sr.	Knox county, Missouri	Five shares (5).
Wm. F. Plumer	Knox county, Missouri	Two shares (2).
John B. Poag	Knox county, Missouri	One share (1).
Sylvester Schultz	Knox county, Missouri	Two shares (2).
David Bly	Knox county, Missouri	One share (1).
Charles C. Morey	Knox county, Missouri	One share (1).
S. Taylor	Knox county, Missouri	One share (1).
G. G. Beswick	Knox county, Missouri	Two shares (2).
Albert S. Bostick	Knox county, Missouri	One share (1).
Jonathan Oldfather	Knox county, Missouri	One share (1).
Nimrod Barnes	Knox county, Missouri	Two shares (2).
Samuel Surrey	Knox county, Missouri	One share (1).
Levi S. Elston	Knox county, Missouri	One share (1).
E H. Hutcheson	Knox county, Missouri	One share (1).
Wm. C. Hillis	Knox county, Missouri	Three shares (3).
Mrs. B. Tooker	Knox county, Missouri	One share (1).
111 Larkin Miller	Knox county, Missouri	One share (1).
C. H. McCoy	Knox county, Missouri	Two shares (2).
J. W. Lee	Knox county, Missouri	One share (1).
Fenton Bagby	Knox county, Missouri	One share (1).
Frederick Walter	Knox county, Missouri	One share (1).
James Wait	Knox county, Missouri	Four shares (4).

Names.	Place of residence.	No. of shares.
Jacob Thomas	Knox county, Missouri	Ten shares (10).
Elizabeth Porter	Knox county, Missouri	Two shares (2).
W. J. Brown	Knox county, Missouri	One share (1).
John Winterbottom	Knox county, Missouri	Twenty shares (20).
Phillip B. Linville	Knox county, Missouri	Ten shares (10).
Samuel M. Wirt	Knox county, Missouri	Five shares (5).
James A. Reid	Knox county, Missouri	Ten shares (10).
Geo. W. Fulton	Knox county, Missouri	Five shares (5).
John P. Josk	Knox county, Missouri	Two shares (2).
John Early, Jr.	Knox county, Missouri	Two shares (2).
A. W. Harris	Knox county, Missouri	Two shares (2).
Wm. H. Wyatt	Knox county, Missouri	Two shares (2).
Robert Coleman	Knox county, Missouri	Four shares (4).
Isham Gill	Knox county, Missouri	Two shares (2).
Benjamin Brown	Knox county, Missouri	One share (1).
Bowen & Bros.	Knox county, Missouri	Three shares (3).
John W. Janis	Knox county, Missouri	One share (1).
David Irwin	Knox county, Missouri	Three shares (3).
E. V. Wilson	Knox county, Missouri	Five shares (5).
Thomas T. Taylor	Knox county, Missouri	One share (1).
A. J. White	Knox county, Missouri	One share (1).
Harvey Green	Knox county, Missouri	One share (1).
D. B. Malomy	Knox county, Missouri	One share (1).
112 Joseph Fox	Knox county, Missouri	One share (1).
James W. Lyon	Knox county, Missouri	One share (1).
Hurd & Hoxby	Knox county, Missouri	Four shares (4).
Benjamin F. Dyer	Knox county, Missouri	One share (1).
Elizabeth Hawkins	Knox county, Missouri	Two shares (2).
Frederick Lamon	Knox county, Missouri	One share (1).
D. E. Hared	Knox county, Missouri	One share (1).
A. Coony	Knox county, Missouri	Three shares (3).
H. R. Parsons	Knox county, Missouri	One share (1).
J. E. Owsley	Knox county, Missouri	One share (1).
James M. De France	Kirksville, Missouri	Fifty shares (50).
Morris A. Lane	Kirksville, Missouri	One hundred & fifty shares.
John McPherson	Brownsville, Nebraska	Eighteen shares (18).
L. M. Rich	Brownsville, Nebraska	One share (1).
A. U. Morgan	Brownsville, Nebraska	Sixteen shares (16).
Luther Hoadly	Brownsville, Nebraska	Five shares (5).
McCrary & Nichols	Brownsville, Nebraska	One share (1).
H. L. Mathews	Brownsville, Nebraska	One share (1).
H. C. Lett	Brownsville, Nebraska	One share (1).
R. W. Burras	Brownsville, Nebraska	One share (1).
T. W. Tipton	Brownsville, Nebraska	Two shares (2).
R. S. Hanniford	Brownsville, Nebraska	One share (1).
H. M. Atkinson	Brownsville, Nebraska	One share (1).
J. W. Blackburn	Brownsville, Nebraska	Sixteen shares (16).
Jorris S. Church	Brownsville, Nebraska	Sixteen shares (16).
J. L. Colhapp	Brownsville, Nebraska	One share (1).
F. A. Tisdell	Brownsville, Nebraska	One share (1).
A. P. Cogswell	Brownsville, Nebraska	Sixteen shares (16).
M. G. Roseberry	Maryville, Missouri	Ten shares (10).
113 W. D. Lewis	Brownsville, Nebraska	One share (1).
C. A. Savage	Quincy, Illinois	Twenty-one shares (21).
C. M. Pomroy	Quincy, Illinois	Twenty one shares (21).
T. R. Selmes	Quincy, Illinois	Twenty-one shares (21).
Thomas Redmond	Quincy, Illinois	Twenty-one shares (21).
John Wood	Quincy, Illinois	Twenty-one shares (21).
Thomas Jasper	Quincy, Illinois	Twenty-one shares (21).
George Adams	Quincy, Illinois	Twenty-one shares (21).
L. & C. H. Bull	Quincy, Illinois	Twenty-one shares (21).

STATE OF MISSOURI, } ss:
Adair County, }

Be it remembered that on this twenty-fourth day of June, A. D. eighteen hundred and sixty-nine, Thomas Jasper, C. M. Pomroy, and G. A. Savage, who are personally known to the undersigned judge of the probate court in and for the county of Adair and State of Missouri, to be three of the directors named in the within and foregoing articles of association, come before me, and, being by me first severally duly sworn, did depose and say on oath that twenty-three hundred shares, of the sum of one hundred dollars to each share, and amounting in the aggregate to the sum of two hundred and thirty thousand dollars, purporting to be subscribed by the signers of said articles of association to the capital stock of the company therein named, have been by the said subscribers duly and in good faith subscribed for the purpose of constructing, maintaining, and operating the railroad in the said articles subscribed, and that the said sum of money so subscribed is more than the
114 sum of one thousand dollars per mile for each mile in length for said contemplated railroad, and that five per cent. of the said subscription have been paid by the said subscribers on their respective subscriptions in cash to the directors in said articles named, and that it is intended in good faith to construct, maintain, and operate the said railroad, the route and terms of which are described in said articles, and for the construction of which the said association is formed; and further deponents say not.

THOMAS JASPER.
C. M. POMROY.
C. A. SAVAGE.

Subscribed and sworn to before me.

In witness whereof I, the undersigned, Jacob Sands, judge of the probate court in and for the county of Adair and State of Missouri aforesaid, hereunto set my hand and seal of the said [SEAL.] court this twenty-fourth day of June, A. D. eighteen hundred and sixty-nine, at my office, in Kirksville, in said county of Adair and State aforesaid.

JACOB SANDS, *Judge.*

115 *Objection by Resp. to Articles of Association.*

To the introduction of which the defendants objected because no profile or map of the route intended to be adopted by the company had been made and filed in the office of the county clerk, nor had written notice been given to occupants of the land over which the route of the road is so designated, as required by section 12, chapter 63, General Statutes of Missouri of 1865; because said company has not made or caused to be made and filed in the office of the recorder of deeds the map and profile required by section 44 of act of March 24, 1870. They object because there is no evidence to show that they begun the construction of their road within two years

after the filing of the articles of association, as required by section 46, article 2, page 312, First Wagner Statute; which objections were by the court overruled; to which ruling of the court defendant excepted at the time.

Edward McCabe's Testimony.

EDWARD MCCABE, sworn as a witness for the relator, testified as follows:

I was general attorney of the Q., M. & P. R. R. Co. from the time of its organization, June 29th, 1869, until quite a time thereafter. The construction of said road began before the 22nd day of December, 1869."

Relator then offered in evidence the order of the Sullivan county court, dated the 22nd day of December, 1869, submitting to the voters of said county the question whether they would subscribe the sum of $200,000 *dollars* to the capital stock of the Q., M. & P. R. R. Co.; which order is in words and figures following, to wit:

116 *Order Sullivan Co. Court Whether They Would Subscribe $200,000, &c.*

In the County Court of Sullivan County, at the December Adjourned Term of 1869.

Be it remembered that a special election be holden in said Sullivan county at the various election precincts thereof on the 23rd day of February, 1870, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan will consent to a subscription in the sum of two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company, subject, however, to the following express conditions, to wit: Said railroad to be located and constructed through said Sullivan county from east to west on a line as near through the center of said county as practicable, said company to locate, build, and maintain a general freight and passenger depot within one-half mile of the town of Milan and south or west of the geographical center of said county, and also a depot at or as near Greencastle, in the east part of said county, as practicable, and one at or as near Wintersville, in the west part of said county, as practicable; that said subscription be paid to said company in the bonds of said county at par. Said bonds shall bear interest at the rate of seven per centum, payable annually, to bear date the day of their issue and become due and payable twenty years after the date thereof, provided the county court of said county may at its election provide for and pay off ten per cent.
117 of the principal of said bonds each year after ten years have elapsed from the date of said bonds and may provide in said bonds for such payment of principal; that whenever said company shall have surveyed and permanently located said rail-

road continuously through said State of Missouri from West Quincy, in Marion county, in said State, to some point on the Missouri river opposit- or near Brownsville, in Nebraska, and shall have continuously graded, bridged, and tied six miles of said railroad within Sullivan county aforesaid, upon the line hereinbefore designated, then the county court of said Sullivan county shall issue and deliver to said railroad company the bonds of said Sullivan county to the amount of forty thousand dollars, and for each additional section of six miles so continuously graded, bridged, and tied within said county of Sullivan said county court shall issue and deliver to said company an additional sum of forty thousand dollars in the bonds of said county as aforesaid until the whole subscription aforesaid shall have been paid up:

Provided that the last installment of said subscription shall not be paid to said company until said railroad shall have been completely and continuously graded, bridged, and tied from the eastern boundary of said Sullivan county to the western boundary of said Sullivan county.

And be it ordered that at said special election all persons
118 voting for such subscription shall have written or printed on their ballots "— two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions and limitations provided in an order of the county court of said county of Sullivan made at its December term, 1869, entitled railroad order? Yes," and those voting against said subscription shall have written or printed on their ballots, "Shall Sullivan county, in the State of Missouri, subscribe to the capital stock of the Quincy, Missouri and Pacific Railroad Company the sum of two hundred thousand dollars upon the stipulations, limitations, and conditions prescribed in the order of the county made at its December term, 1869, entitled railroad order? No."

And be it further ordered that twenty days' notice of such special election be given by the sheriff of said county by causing to be published a copy of this order in the Weekly North Missouri Herald and by posting at least three copies of this order in each municipal township in said county twenty days prior to said election, and that the clerk of the court furnish the sheriff of said county a copy of this order.

The relator then offered order of the county court dated Feb. 23rd, 1870, declaring the result of said election, which is in words and figures following, to wit:

119 *Order of the Co. Court Declaring Result of Election.*

STATE OF MISSOURI, } ss:
County of Sullivan, }

Whereas Sullivan county has voted in favor of said county subscribing two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company, therefore be it

ordered that the president and clerk of the county court of said county be and are hereby authorized to enter said subscription upon the stock books of said company and also upon the records of this court, upon the conditions contained and expressed in an order rendered by said county court at its December term, 1869:

Now, at this day, Feb'y 23rd, 1870, the poll books for the special election held in the county of Sullivan, State of Missouri, at the various election precincts thereof, on the 22nd day of February, A. D. 1870, as presented to the county court, are examined and counted and the following found to be the votes cast, to wit: "Shall Sullivan county, in the State of Missouri, subscribe two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions and limitations provided in an order of the county court of said county made at its December term, 1869, entitled railroad order?" Yes, 1,049 votes; no, 257 votes; majority for, 792 votes.

120 *Objections by Resp's.*

To the introduction of which the defendant objected, because there was no proof of registration and no appointment of judges of election; which objection was overruled and the order read in evidence. The defendant at the time excepted to said ruling.

The relator then offered in evidence an order of the county court, dated April 5th, 1871, authorizing James Beatty, presiding justices of said court, and John Q. Boner, the clerk thereof, to make and enter a subscription on the stock books of said company; which order is in words and figures as follows, to wit:

Order of Co. Court; Make & Enter of Co. the Subscription.

STATE OF MISSOURI, } *ss:*
County of Sullivan, }

In the County Court, in Vacation.

Now, at this day, comes James M. De France, agent of the Quincy, Missouri and Pacific Railroad Company, and presents the stock books of said company and requests that the subscription of two hundred thousand dollars to the capital stock of said railroad company voted by the citizens of said Sullivan county to aid in the construction of said railroad be subscribed on the stock books of said Quincy, Missouri & Pacific Railroad Company, agreeable to an order of the county court made at the December term, 1870:

Now, therefore, I, James Beatty, the presiding justice of the county court of Sullivan county, Missouri, in pursuance and
121 by the authority in me vested by said order duly authorizing and directing and empowering me so to do, have and do hereby enter in the stock book of the Quincy, Missouri & Pacific Railroad Company, and in the name of and for said county of Sullivan do hereby subscribe for and take, two hundred thousand dol-

lars of the capital stock of the said Quincy, Missouri & Pacific Railroad Company, subject, however, and expressly taken upon the conditions set forth in the orde- of this court made at its December term, on the 22nd day of December, 1869, as copied on said book for the protection and safety of said county in said stock and subscriptions hereof made *in said stock and subscription hereof made.*

Given under my hand this April 5th, 1871.

JAMES BEATTY,
Ex Officio President of the County Court.

Attest: J. Q. BONER, *Clerk.*

Objection by Respondents.

To the introduction of which the defendants objected, because such order was without authority of law; which objection was overruled by the court; to which ruling of the court — at the time excepted, and said order was read in evidence.

Edward McCabe's Testimony, Recalled.

EDWARD MCCABE was recalled as witness for relator and testified as follows:

122 The books here shown me are the subscription books of the Quincy, M. & P. R. R. Co. and vol. 2 of records proceeding- of the board of directors of said company.

Stock Books Offered & Read in Evidence.

The relator then offered in evidence the stock books of said company, showing the subscriptions by James Beatty, presiding justice of the county court of Sullivan Co., Mo., and John Q. Boner, clerk of said county, to the capital stock of said R. R. Co. in compliance with the order of the county court as follows, to wit:

123 *Subscription as Entered on the Stock Books of said Company.*

December Adjourned Term, 1869.

STATE OF MISSOURI, } ss:
County of Sullivan, }

Railroad order.

Whereas in the county court of Sullivan county, at the December adjourned term of 1869—

It was ordered that a special election be holden in said Sullivan county, at the various voting precincts thereof, on the twenty-second day of February, eighteen hundred and seventy, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan will assent to a subscription in the sum of two hundred thousand dollars to the capital stock of the Quincy, Mis-

souri and Pacific Railroad Company, subject, however, to the following express conditions, to wit: Said railroad to be located and constructed through said Sullivan county from east to west on a line as near through the center of said county as practicable, said company to locate, build, and maintain a general freight and passenger depot within one-half mile of the town of Milan and south or west of the geographical center of said county, and also a depot at or near Greencastle, in the east part of said county, as practicable, and one at or near Wintersville, in the west part of said county, as practicable; that said subscription be paid to said company in the bonds of said county at par. Said bonds shall bear interest at the rate of seven per centum, payable annually, to bear date the day of their issue and become due and payable twenty years after the date thereof, provided the county court of said county may at
124 its election provide for and pay off ten per cent. of the principal of said bonds each year after ten years have elapsed from the date of said bonds and may provide in said bonds for such payment of principal; that whenever said company shall have surveyed and permanently located said railroad continuously through said State of Missouri from West Quincy, in Marion county, in said State, to some point on the Missouri river opposite or near Brownsville, in Nebraska, and shall have continuously graded, bridged, and tied six miles of said railroad within Sullivan county aforesaid upon the line hereinbefore designated, then the county court of said Sullivan county shall issue and deliver to said railroad company the bonds of said Sullivan county to the amount of forty thousand dollars, and for each additional section of six miles so continuously graded, bridged, and tied within said county of Sullivan said county court shall issue and deliver to said company an additional sum of forty thousand dollars in the bonds of said county as aforesaid until the whole subscription aforesaid shall have been paid up, provided that the last installment of said subscription shall not be paid to said company until said railroad shall have been completely and continuously graded, bridged, and tied from the eastern boundary of said Sullivan county to the
125 *the* western boundary of said Sullivan county; and be it further ordered that — said special election all persons voting for such subscription shall have written or printed on their ballot, "Shall Sullivan county, in the State of Missouri, subscribe two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions and limitations provided in order of the county court of said county of Sullivan made at its December term, eighteen hundred and sixty-nine, entitled railroad order?" "yes," and those voting against said subscription shall have written or printed on their ballots, Shall Sullivan county, in the State of Missouri, subscribe to the capital stock of the Quincy, Missouri and Pacific Railroad Company the sum of two hundred* thousand dollars upon the stipulations, limitations,

x

* Erased in copy.

and conditions prescribed in the order of the county court of said county made at its December term, eighteen hundred and sixty-nine, entitled railroad order? "no."

And be it further ordered that twenty days' notice of such special election be given by the sheriff of said county by causing to be published a copy of this order in the Weekly North Missouri Herald and by posting at least three copies of this order in each municipal township in said county twenty days prior to said election, and that the clerk of this court furnish the sheriff of said county a copy of this order; and whereas on this day, Feb'y 23rd, 1870, the
126 poll books for the special election held in the county of Sullivan and State of Missouri, at the various election precincts thereof, on the (22nd) twenty-second day of February (A. D. 1870), eighteen hundred and seventy, as presented to the county court, are examined and counted and the following found to be the vote cast, to wit: "Shall Sullivan county, in the State of Missouri, subscribe two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions and limitations provided in an order of the county court of said county made at its December term, eighteen hundred and sixty-nine, entitled railroad order?" yes, 1,049 votes; no, 257 votes; majority for, 792 votes.

STATE OF MISSOURI, } *ss:*
County of Sullivan, }

Whereas Sullivan county has voted in favor of said county subscribing two hundred thousand dollars to the capital stock of the Quincy, Missouri and Pacific Railroad Company, therefore be it ordered that the president and clerk of the county court of said county be, and are hereby, authorized to enter said subscription upon the records of this court upon the conditions contained and expressed in an order rendered by said county court at its December term, eighteen hundred and sixty-nine:

127 Now, therefore, I, James Beatty, the presiding justice of the Sullivan county court, in pursuance and by the authority investing and empowering me so to do, have, and do hereby, enter in this the "Stock Book of the Quincy, Missouri and Pacific Railroad Company, and in the name of and for said county of Sullivan do hereby subscribe for and take two hundred thousand dollars of the capital stock of the said Quincy, Missouri and Pacific Railroad Company," subject, however, and expressly taken upon the conditions set forth in the order of this court made on the 22nd day of December, 1869, as copied in this entry for the protection and safety of said county in said stock and subscription hereby made.

Given under my hand this April 5th, 1871.

[SEAL.] JAMES BEATTY,
Ex Officio President of the County Court of Sul. County.

Attest: JOHN Q. BONER,
Clerk Sullivan County Court.

To the introduction of which the defendants objected because it was without authority of law; which objection was by the court overruled, and defendants at the time excepted.

Relator then offered in evidence record of the proceedings of the board of directors of said company, vol. 2, showing location of said railroad.

Which is as follows, to wit:

Proceedings Board of Directors Showing Location.

128 Special meeting.

QUINCY, *June* 7, 1879.

A special meeting of the board of directors was held at the rooms of the Union bank, Quincy, Illinois, at 7 p. m., this date, pursuant to call of the president—present, President Root, in the chair, and Directors Menke, Wheeler, Tarkworthy, Miller, Sawyer, Smith, and Green, a majority of said board—among other, the following proceedings were had, to wit:

Proceeding- of Board of Directors Showing Location of R. R.

On motion of Director Wheeler, the following preamble and resolution were unanimously adopted:

Whereas it appears that no formal action of this board touching the location of the line of its road continuously through the State of Missouri appears of record and the board having now under consideration the matter of the location of the completed and uncompleted portion of the line, it is therefore resolved by the board of directors of the said Quincy, Missouri and Pacific Railroad Company that the said railroad be, and is hereby, located from a point opposite the city of Quincy, in the State of Illinois, from a point at the west end of the Quincy railroad bridge, in Marion county, Missouri, westward through the counties of Marion, Lewis, Knox, Adair, and Sullivan on the lines as now completed, maintained, and operated to Novinger, in said county of Adair, to and by way of Edina, in Knox county, and to and by way of Kirksville, in Adair county, in the said State of Missouri, and that the same be, and is hereby, located from Novinger aforesaid westward on the line now actually graded, bridged, and tied from Novinger aforesaid to a point in said county of Sullivan near Milan, in said county;

129 that the said line is hereby located from the said Novinger westward, as indicated and shown by the line continuously graded, bridged, and tied from said Novinger to the beforenamed point near Milan, and the whole of the line in said county of Sullivan, from the western boundary of Adair county aforesaid, is hereby located as near the center of said county of Sullivan as practicable, as shown by the map or maps filed and to be filed in the office of the clerk of the county court of said county of Sullivan. The said line is located and is to pass from east to west within one-half mile of the town of Milan, in said county of Sullivan, and as

near through the center of said county as practicable, as shown by said map, and there is hereby located a general freight and passenger depot within one-half mile of the town of Milan and southwest of the geographical center of said county, and also a depot at or near Greencastle, in the east part of said county; and also there is hereby located a depot at or near Cowtinville, in the west part of said county; and the said railroad is hereby located continuously through the said State of Missouri from a point near Milan aforesaid to which the said road is now graded, bridged, and tied, westwardly through the counties of Sullivan, Grundy, Harrison, Gentry, Nodaway, and Atchison to a point opposite Brownsville, in the State of Nebraska, and from the west end of the said Quincy railroad bridge through the said State of Missouri, by way of Edina, in Knox county, and by way of Kirksville, in Adair county, through the said county of Sullivan, as above indicated, to the said point in Atchison county, on the Missouri river, opposite Brownsville, in the State of Nebraska.

On motion of Director Sawyer, the board adjourned.

[SEAL.] J. G. ROWLAND, *Secretary.*

130 *Objections by Respondents Overruled.*

To the instructions of which the defendants objected, because the record does not show permanent location of said railroad nor can such permanent location be shown, because relator cannot locate its railroad without work being done; which objections were by the court overruled, and the same was read in evidence; to which ruling of the court defendants at the time excepted.

E. M. Collins' Testimony.

E. M. COLLINS, sworn for the relator, testified as follows:

My occupation is civil engineering. I was in the employ of the Q., M. & P. R. R. Co. in the capacity of an assistant engineer from about the month of June, 1869; about the commencement of work on said road; continued in the employ of said company until 1873 and 1874, when the construction, by reason of the panic, ceased. In 1877 I became chief engineer of said company, and in Dec., 1877, located the same from Kirksville to Novinger, the said railroad having previously been located and built from West Quincy to Kirksville. As such civil engineer I located the line of said railroad from Novinger to Greencastle in the spring of 1878, and continued the location thereof to the city of Milan. During the summer of that year, on the same general line on which the same is now being operated, there were more than twelve miles of said road within said county graded, bridged, and tied prior to the 29th day of June, 1879.

Cross-examination:

The distance between Novinger and Greencastle is about twelve miles. In the years 1870–'1 we made some preliminary surveys in

a northwest direction from Milan, which preliminary surveys ran a mile or two south of the town of Wintersville, but we never made any permanent location there.

131 *A. Payne et al., Witness- for Relator.*

Relator then produced Addison Payne, E. L. Fish, M. Hare, and J. M. Campbell, who, being sworn on part of relator, gave evidence tending to prove relator's compliance with the contract of subscription as to the first 12 miles within said county.

Record of Sullivan County Court Showing Demand.

Relator then offered in evidence record of the Sullivan county court showing a demand for the issue of the bonds and a tender to said county court of a certificate of stock and a refusal of said court to issue said bonds, which is in words and figures as follows, to wit:

The Quincy, Mo. & Pacific R. R. Co. Tender of stock & demand for bonds.

In the matter of subscription of Sullivan county, Mo., to the capital stock of the Quincy, Missouri and Pacific Railroad Company and tender to the court — a certificate for 800 shares of $100.00 each in the capital stock of said company and the demand of eighty thousand dollars in bonds in payment of 1st & 2nd installments.

Whereas the said railroad company have wholly failed and neglected to comply with the contract for said subscription, it is therefore considered and adjudged by the court that — the 1st & 2nd installments nor any other installments are due said railroad company, and that the bonds in payment of said 1st & 2nd installments be not issued, and that the stock and the certificate for the same be, and the same is hereby, rejected and refused.

Which was thereupon read in evidence.

Tender of Cert. of Stock.

Thereupon the relator tendered to the defendants a certificate of stock for 800 shares of the capital stock of the Q., M. & P. R. R. Co., which said defendants then and there declined to receive,
132 such certificate being in words and figures following, to wit:

Certificate of Stock.

(Number 490.) (Shares, 800.)

Organized under the laws of the State of Missouri.

The Quincy, Missouri and Pacific Railroad Company. Capital stock, 6,000,000 dollars.

This is to certify that the county of Sullivan, State of Missouri, is entitled to eight hundred shares of the capital stock of the

Quincy, Missouri and Pacific Railroad Company, transferable only on the books of the company in person or by attorney on the surrender of this certificate.

Witness the seal of the company and the signature- of the president and secretary, at West Quincy, this 6th day of Feb-
[SEAL.] ruary, A. D. 1882.

CHAS. H. BULL, *President.*
C. H. SPENCER, *Secretary.*

Relator Rests.

The relator here rested.

Whereupon the defendants asked an instruction in the nature of a demurrer to the evidence, as follows, to wit:

Admitting all the evidence on the part of relator to be true, the finding must be for respondent.

Respondent's Demurrer to the Evidence Refused.

Which was by the court refused; to which action of the court the defendant at the time excepted.

Joshua Grey et al. Testify for Respondants.

Thereupon the defendant produced Joshua Gray, Thomas McCallister, A. W. Harris, O. P. Phillips, E. E. Prindle, Buck Mason, Sumner Boynton, and S. M. Grigsby, who, being sworn, gave evidence tending to prove that the relator had not complied with the contract of subscription.

W. H. Custer.

W. H. CUSTER, introduced as a witness for defendants, testified as follows:

Myself, F. E. Stone, and W. B. Taylor composed the board
133 of registration in 1869–'70. In the winter of 1869 we registered the county at a special re-istration, using the general registration books made in 1868; and in Feb'y, 1870, we again held a special registration in said county.

James Morris.

JAMES MORRIS, on part of the defendant-, testified as follows:

I have been the clerk of the county court for the last eight years. (Registration books of 1868 and special registration of 1869–'70 here shown the witness.) These are registration books of Sullivan county of 1868 and subsequent special registration of 1869 and 1870.

F. E. Stone.

F. E. STONE, on the part of the defendant-, testified as follows:

I have recently examined the registration books identified by Mr.

Morris. They are books used for the general election in 1868 and at the special election in 1869 and 1870. They were prepared and arranged for use by W. B. Taylor, W. H. Custer, and myself. The thirteen books now shown me are the books that were used at the special election held Feb'y 22, 1870. Mr. Custer made certified copies of special registration of voters for the use of the judges of election as soon as such registration was completed.

Cross-examined:

Myself, Taylor, and Custer composed the board of registration, and they held a special registration in the several townships and elections precincts prior to and for the special railroad election held on the 22 day of Feb., 1870, and appointed the judges for such election.

Registration Books Offered in Evidence.

Defendants then offered in evidence the original registration books and copies thereof as on file in the county clerk's office, and as prepared and used at the general election of 1868 and subsequent special elections of 1869 and 1870.

Registration Books are Objected to by the Relator.

To the introduction of which the relator objected—

1st. Because the originals are mutilated and copies are
134 imperfectly certified.

2nd. Because they are in part only the original books and in part certified copies, while the law requires certified copies from the original lists which are furnished for the use of the judges of the election in the several voting precincts.

3rd. Because the law requires the registration officers to make alphabetical copies from which voters should vote, and there is no evidence to show that the list- offered are the ones voted from.

4th. Because the registration books are only intended as evidence to the judges of election of the person's right to vote when he offers to cast his ballot.

5th. Because the best evidence of the number of qualified voters in said county at the time of making such subscription is found in the whole number of votes cast at the special election so held to ascertain the sense of the voters of said county.

6th. Because, although such registration books might show a larger number of persons registered during the general registration of 1868 and subsequent special registration, Sept. 2, 1869, and Feb. 17, 1870, than voted at such special election, yet it would not be any evidence that such persons found on such registry lists were qualified voters at the time of the election unless they actually voted.

7th. Because the record discloses the fact that the county court ordered an election which, after due notice, was lawfully held, the poll books and returns canvassed by the county clerk and judges, and the result judicially declared by the said county clerk and judges and the county court; that more than two-thirds of the qualified

voters of said county had assented thereto, and the subscription duly entered upon the stock books of the company, and
135 that the company in good faith has completed its part of said contract of subscription, and the county cannot now for the first time be heard to deny the validity of such contract or to introduce evidence tending to impair the same.

8th. Because the record already in evidence show- an election to have been held, the poll books and election returns canvassed by the county clerk and the county judges, and upon such canvass and return the county court judicially declared that more than two-thirds of the qualified voters of said county had assented to such subscription, and thereupon ordered the stock to be subscribed and entered upon the stock books of said company.

9th. Because at the time of the making of this subscription by Sullivan county, to wit, April 5th, 1871, there can be no question but what it was the settled law of this State that if an election was duly held, conducted as required by law, and that more than two-thirds of the qualified voters of the county voting at the election voted in favor of the subscription, such election is valid and fully authorized the county to make and enter such subscription upon the stock books of the company, and when so entered because a valid and binding contract between the county and the company, and the attention of the court is here called to the case of The State *vs.* Winkelmeyer, 35 Mo., 103; also to the case of State *ex rel.* Jonathan M. Basset, plaintiff and petitioner, against Wm. P. Renick, mayor of the city of St. Joseph, respondents, 37 Mo., 270; also to the case of The State *vs.* Binder, 38 *id.*, 450; also to the case of State of Mo. *ex rel.* North Mo. Central R. R. Co. *vs.* Linn County Court, 44 *id.*, 504. It will be found in the cases cited that the supreme court of Missouri has made and declared a judicial interpretation that two-thirds of the qualified voters of a county, city, or town
136 voting at an election means the same thing as and is equivalent to two-thirds of the qualified voters of such county, city, or town voting at an election. Not only has it been so judicially determined, but this construction had been so universally adopted and acknowledged that the legislature of Missouri, in the act known as the township-aid act, approved March 23, 1868, gave it the same legislative construction by using in such act (according to the decision cited) synonomous words to those used in the constitution and general statutes of 1865, viz: "Two-thirds of the qualified voters of such township voting at such election."

10th. Because the judicial declaration and ascertainment by the county clerk and county judges in the manner and form required by law that more than two-thirds of the qualified voters of said county voted in favor of such subscription conferred upon the county court a valid power to make the subscription and contract in question, and is legal and binding upon all the world until set aside and annulled in a direct proceeding for that purpose, and cannot be attacked in the collateral manner attempted to be done in this case.

11th. Because by the terms of section 28 of declaration of rights

in the constitution of Missouri of 1865 and in and by section 10 of article 1 of the Constitution of the U. S. it would have been incompetent for the legislature to impair the validity of the contract in question by a legislative enactment, and certainly courts cannot be permitted by judicial construction to do those things which the organic law prohibits the legislature from doing, and by such judicial construction impeach and impair the contract in question by overruling and overriding the former decision of the same court. When contracts have been made and rights become vested by reason of such former decisions and as the effect of this evidence is in a collateral way to impeach and impair the validity of
137 the contract in question, which has in good faith been wholly executed by the relator, such books ought not to be admitted for any such purpose.

Objection Overruled and Books Admitted in Evidence.

Which said several objections were by the court overruled and the said books admitted in evidence; to which action and ruling of the court the relator at the time excepted.

Relator Concedes that Registration Books Show 1,940 *Registered Voters.*

Thereupon the defendant began to read from the registration book of Polk township, in said county, used at the special election, Feb'y 22, 1870; but before completing the reading thereof counsel for relator conceded that the registration books offered in evidence, counting all those registered for general election of 1868 and those added in 1869, and those added for special election, Feb'y 22, 1870, contained the names of 1,940 persons as qualified to vote in said county at said election, and that said names were placed upon said books by the aforesaid registering officers and their predecessors in office for use in the general election of 1868, the special election of 1869, and special election held Feb'y 22, 1870.

Defendants Rested.

Upon such concession being made, defendants rested.

E. M. Collins, for Relator, Recalled.

In rebuttal, E. M. Collins recalled and testified on behalf of relator as follows:

The building of the road—that is, the grading, bridging, and tieing—for the first twelve miles in Sullivan county costs $16,000 per mile. Had several conversations with Judge Grigsby, who then was and for some years previous had been sole judge of the county court, and he always said that when the contract was complied with the company should have the bonds. The preliminary original surveys run three or four miles south of Wintersville.

Cross-examined:

The first permanent survey in which the line was finally established west of Milan was made in 1880; made several pre-
138 liminary surveys prior to that time.

Edward McCabe Recalled.

EDWARD MCCABE, recalled, testified on behalf of the relator as follows:

"I am and have been for quite a number of years general attorney for the Q., M. & P. R. R. Co., and know that the company relied in good faith upon this subscription until after the railroad was completed. No question was ever made or mooted but that two-thirds of the qualified voters of said county had voted in favor of said subscription."

Respondents Concede Number of Votes Polled in 1868.

Relator offered in evidence abstract of election returns in said county for 1868, which is as follows, to wit:

"In lieu of copying the entire abstract of the votes cast for the several candidates at the general election in 1868, it is admitted by the attorneys for the respondents that there *was* 926 votes for the Republican electors and 568 votes for the Democratic electors—in all, 1,494 votes; that there were a total of 1,489 votes cast for the several candidates for Congress; that there were in all 1,496 votes cast for the office of governor; that there were in all a total of 1,473 votes cast for members of the legislature, and that the foregoing represents the highest number of votes in said county polled at said election."

To the introduction of which the defendant objected on the grounds of its incompetency; which objection was by the court sustained, and was by the court rejected; to which action of the court relator at the time excepted.

Relator then offered in evidence abstract of votes cast at the general election in 1870.

139 *Respondents Concede the Number of Votes Cast in* 1870.

"For the purpose of making this transcript without encumbering the record with a full certified abstract of the votes cast for the several candidates at the general election held on the 1st Tuesday after the 1st Monday in Nov., 1870, it is admitted that the aggregate number of votes cast at said election for governor was 1,508; that the total number of votes cast for the several candidates for Congress was 1,503; that the total number of votes cast for the several candidates for representative in the legislature aggregated 1,490, and that the aggregate votes cast for the remainder of the State and county officers voted for at said election did not exceed

those for governer, Congress, and legislature as aforesaid;" which was read without objection.

The relator then offered in evidence the proposition of the county judges, dated Aug. 27, 1879, as follows, to wit:

Proposition of County Court.

The court will issue the $80,000 in bonds as claimed by the r'road company as due them on the contract on record on the following conditions:

When the Q., M. & P. r'road has been continuously and completely ironed and operated from West Quincy to a point 6 miles within Sullivan Co. & a depot & side track built in one-half mile of the town of Greencastle, on the line of said road, provided the citizens of said town of Greencastle pay to the said R. R. Co. the sum of $12,00– in cash or its equivalent & that the entire grading as far as the town of Milan be put under contract, we will issue and deliver to said Co. $20,000 in bonds of said county; and when 6 miles more of the said r'road has been continuously and completely
140 ironed & operated on the line already graded & the r'road completely graded from the east line of said Sullivan Co. to the town of Milan, we will issue and deliver to the said company the sum of $20,000 more in bonds of said county; and when the said r'road has been constructed and continuously & completely ironed & operated from West Quincy to a point one-half mile from the original town of Milan, as designated of record, and depot & side-track built in a half mile of the court-house of Milan, & all completed by the 1st day of Jan., 1880, & the county released from all further liabilities, we will issue and deliver to said company $40,000 more in bonds of said Co.

Aug. 27th, 1879.

A. W. HARRIS,
THOS. McCALLISTER, *Judges.*
JOSHUA GRAY.

Objection by Resp. Sustained.

To the introduction of which the defendants objected, because irrelevant and incompetent; which objection was by the court sustained; to which action of the court the relator at the time excepted.

This was all the evidence offered on the part of either party.

Thereupon the relator moved the court to declare the law as follows:

Instructions.

1st. If from the evidence the court finds that on the 22nd day of December, 1869, the county court of Sullivan county, Missouri, did order a special election to be holden in the several election precincts of said county on the 22nd day of February, 1870, to ascer-

tain the sense of the voters of said county whether said county should subscribe $200,000 to the capital stock of said railroad company upon the conditions in such order prescribed; that in pursuance of said order an election was duly held and the
141 poll books and returns of said election duly canvassed and declared; that 1,049 voters voting at such election voted in favor of the same and 257 voters voted against the same, and that the county court, acting in pursuance of said vote, declared such subscription carried and entered the same upon the stock books of said company, and that said company had continuously surveyed and permanently located its said road from West Quincy, in Marion county, Mo., to the eastern boundary of Sullivan county, and that from such terminal point the said company had, prior to June 29th, 1879, continuously graded, bridged, and tied twelve miles within said county prior to the filing of the petition for the alternative writ in that cause, then in that event the court declares the law to be that relator is entitled to have and receive from said county the first two installments of bonds mentioned in the contract of subscription, and the peremptory writ must issue.

2nd. The court further declares the law to be that if from the evidence the court believes that an election was ordered by the county court; that such election, on due notice, was lawfully held; that the poll books and election returns were canvassed by the clerk and county judges, and that thereupon and thereafter the county court, acting in the premises, declared that more than two-thirds of the qualified voters of said county had assented to such subscription and made and entered a subscription upon the stock books of the Quincy, Missouri and Pacific Railroad Company in pursuance of such vote, and that thereafter the said company, relying in good faith upon such subscription, substantially completed its road twelve miles within said county on the line contemplated by the order of subscription, then in that event the county is estopped from
142 denying the want of power to issue said bonds, and the judgment of the court must be for the relator and the peremptory writ must issue.

3rd. If from the evidence the court believes that on the 22nd day of Dec., 1869, the county court of Sullivan county did order an election on the 22nd day of Feb'y, 1870, to determine the sense of the qualified voters of said county whether the county court should subscribe $200,000 to the capital stock of the Quincy, Missouri and Pacific Railroad Company upon the conditions in such order of subscription contained; that an election was held at such time; that 1,049 voters voted therefor and 257 votes against the same, then the court declares the law to be that 1,049 votes constitutes more than two-thirds of the qualified voters of said county, as required by law, and their assent to such subscription created a valid power in said county court to make such subscription; and if the court further finds that such subscription was actually made thereunder, and that there has been a substantial compliance with such contract or order of subscription prior to the filing of the petition for the alternative writ by the railroad company, then the judgment

of the court must be for the relator and the peremptory writ will issue.

4th. Although it is conceded that the registration list of 1868, with the names added by the registration officers at a special registration held Sept. 2nd, 1869, and the subsequent special registration held Feb'y 17th, 1870, for the purposes of such special election, shows a larger number of persons than those voting at such special election, yet such fact is not evidence that they were qualified voters on the 22nd day of February, 1870, unless they actually presented themselves for the purpose of voting at such election and
143 voted or offered to vote, and is insufficient to overthow the presumption that all the qualified voters of said county voted at such special election.

And the court then and there refused to declare the law and to give instructions as asked; to which action of the court in refusing so to declare the law the relator at the time excepted.

Whereupon the court found for the defendant- and rendered judgment denying the relief prayed.

This November 27, A. D. 1882.

And now, to wit, Nov. 27th, 1882, comes the relator, by its attorneys, and filed its motion for a new trial herein; which said motion is in words and figures following, to wit:

Motion for New Trial.

In the Circuit Court of Sullivan County, Missouri, Nov. Term, 1882.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Relator,
against
ANDERSON W. HARRIS, THOMAS MCCALLISTER, and GEORGE T. TODD, Judges of the Sullivan County Court, Respondents.

Now comes the relator and files this its motion for a new trial—

1. Because the finding and judgment of the court is for the wrong party. It should have been for the relator instead of respondents.

2nd. Because the finding and judgment of the court is against the evidence, against the law, and against the law and evidence.

144 3rd. Because the court admitted improper and illegal evidence on the part of respondents, against the objections of the relator, and excluded proper and legal testimony offered on the part of said relator.

4th. Because the court erred in refusing to declare the law as asked in relator's instructions numbered one (1), two (2), three (3), and four (4).

5th. Because the judicial declarations and ascertainment that more than two-thirds of the qualified voters of said county voted in favor of such subscription conferred a valid power upon the Sullivan county court to make the contract in question; and, the con-

tract of subscription given in evidence having been wholly executed on the part of relator, the court erred in admitting testimony on the part of respondents tending to impeach, impair, vary, or modify the contract in question to the injury of the relator.

6th. Because at the time of the making of the contract in question the supreme court of Missouri, in the cases of The State *ex rel.* Basett *vs.* Renick, mayor of St. Joseph (37 Mo. Rep., 270), State *vs.* Binder (38 Mo. Rep., 450), The State *ex rel.* N. M. C. R. Co. *vs.* Linn Co. (44 Mo. Rep., 504), and other cases, extending from 1864 to 1872, had judicially declared and construed the phrase "two-thirds of the qualified voters of the county, city, or town" to mean the same thing as and was equivalent to "two-thirds of the qualified voters of such county, city, or town voting at an election," &c.; and, such being the judicial interpretation thereof, the legislature of the State of Missouri, in the act approved March 23rd, 1868, known as the township aid act, adopted the same, and therein used the words "two-thirds of the qualified voters of such town-
145 ship voting at such election" as synonomous with and equivalent to the words used in the constitution and general statutes, and under such author-ative construction the contract in question was made and in good faith executed on the part of the relator company, and the judgment of the court impeaches and impairs the validity of said contract so made and executed. Wherefore the relator says that the judgment of the court is erroneous, in that it is in violation of section 28 of the declaration of rights of the constitution of 1865, and in violation of section 10 of article I of the Constitution of the United States.

JOHN P. BUTLER,
For Relator.

Motion for New Trial Overruled.

Which motion was taken up by agreement, and, being heard and understood, was by the court overruled on the day last aforesaid; to which action and ruling of the court in overruling said motion relator at the time excepted.

And now, to wit, Nov. 27, 1882, come- the relator, by its attorneys, and filed its motion in arrest of judgment herein; which said motion is in words and figures following, to wit:

In the Circuit Court of Sullivan County, Missouri, Nov. Term, 1882.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Relator,
against
146 ANDERSON W. HARRIS, THOMAS MCCALLISTER, and GEORGE T. TODD, Judges of the Sullivan County Court, Respondents.

Motion in Arrest.

Now comes the relator and files this its motion in arrest of judgment—

1st. Because the judgment is for the wrong party and against the law.

2nd. Because the court admitted improper and illegal testimony on the part of respondents and excluded proper and legal testimony on the part of relator.

3rd. Because the court erred in refusing to declare the law as requested by the relator.

4th. Because the court erred in admitting testimony offered on the part of respondents tending to impeach and impair a contract lawfully made and in good faith executed by the relator company.

5th. Because the judgment of the court is erroneous, in that it impairs the obligation of contracts.

6th. Because the court erred in overruling the relator's motion for a new trial.

JNO. P. BUTLER,
For Relator.

Motion in Arrest Overruled.

Which motion was taken up by agreement, and, being heard and understood, was by the court overruled on the day last aforesaid; to which action and ruling of the court in overruling said motion relator at the time excepted.

And now, to wit, Nov. 27, 1882, comes the relator and tenders this its bill of exceptions and prays the court that it be signed, sealed, and made part of the record.

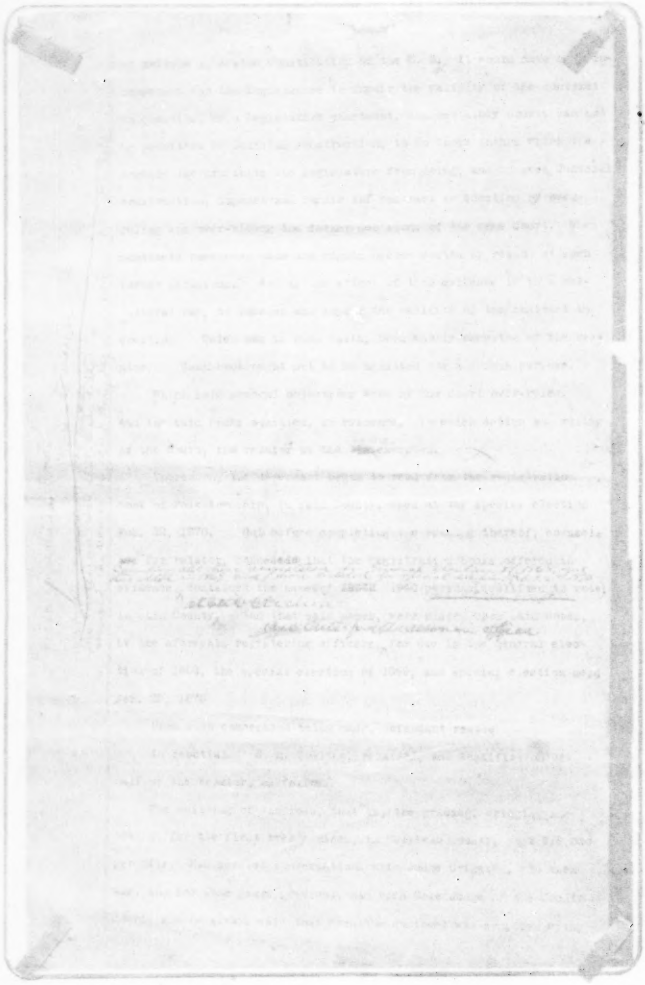
Which is accordingly done this 27th day of Nov., 1882.

Given under my hand and seal the day and year aforesaid.

G. D. BURGESS, [SEAL.]
Judge of the 11th Judicial Circuit.

147 STATE OF MISSOURI, } ss:
County of Sullivan, }

I, H. T. McClanahan, clerk of the circuit court within and for the county and State aforesaid, hereby certify that the foregoing pages, numbered from 1 to 69, both inclusive, partly written in long hand and partly written with a typewriter, is a true and perfect transcript of the record in the case of The State of Missouri at the relation and to the use of the Quincy, Missouri and Pacific Railroad Company, relator, against Anderson W. Harris *et als.*, respondents, as fully and complete as the same appears upon the records of the circuit court in my office and as contained in the bill of exceptions in said cause, in manner and form as the same should have been previously certified. I further certify that this transcript is made by mo as and for a further full, complete amended and true return to the writ of certiorari issued out of the supreme court, dated October 22, 1887, to which I made a partial return under my hand and official seal, dated October 31, 1887; and I further certify that Exhibit "A," hereto attached, is a true and perfect photographic copy of the original bill of exceptions in so far as the same is disputed and as fully as the same now exists in my office; that it is now as it was



at the time it was signed & ordered to be entered of record by the judge of said court, and has not been changed, altered, or amended in any manner whatever since the signing thereof; and I further certify that the transcript and certificate is made for the purpose of making a full, true, and literal compliance with the mandate of the aforesaid writ of certiorari, and for the purpose of substitution in place and in lieu of my former partial return to said writ.

148 In testimony whereof I have hereunto set my hand and the seal of said court. Done at office, in the city of Milan, this 14th day of January, A. D. 1888.

H. T. McCLANAHAN,
Clerk Cir. Court.

(Here follows Exhibit "A," photographic copy, marked p. 148.)

149 And afterwards, to wit, on the 21st day of April, 1888, the following further proceedings were had in said supreme court in said cause, to wit:

* * * * * * *

STATE *ex Rel.* Q., M. & P. R'Y Co., P. E.,
v.
CO. C'T OF SULLIVAN CO., D. E.

* * * * * * *

Come now the parties, by attorneys, and submit these causes to the court on briefs.

And afterwards, to wit, on the 18th day of June, 1888, the following further proceedings were had in said cause, to wit:

150 Supreme Court of Missouri, — Term, 188-.

THE STATE OF MISSOURI at the Relation and to the Use of THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Plaintiff in Error, *vs.* ANDERSON W. HARRIS, THOMAS MONTGOMERY, and GEORGE T. TODD, Judges of the Sullivan County Court, Defendants in Error.	Error to Sullivan County Circuit Court.

Now, at this day, come again the parties aforesaid, by their respective attorneys; and the court here, being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid by the said Sullivan county circuit court rendered, be in all things affirmed and stand in full force and effect; and it is further considered and adjudged by the court that the said defendants in error recover against the said plaintiff in error their costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in the words and figures, as follows, to wit:

151 STATE *ex Rel.* QUINCY, MISSOURI & PACIFIC R. Co., P. E.,
v.
SULLIVAN COUNTY COURT, D. E.

Opinion of the Court.

This is a proceeding by mandamus to compel the judges of the county court of Sullivan county to issue $80,000 of bonds to the Quincy, Missouri & Pacific Railroad Company, upon the trial of which judgment was rendered for defendants, from which plaintiff has prosecuted a writ of error.

The record discloses the following facts: That the Quincy, Missouri & Pacific Railroad Company was, on the 29th of June, 1869, duly incorporated under the laws of this State for the purpose of building and operating a railroad from West Quincy, on the Mississippi river, in Marion county, to a point on the Missouri river, in Atchison county, Missouri, opposite the city of Brownsville, Nebraska; that on the 22d of December, 1869, the county court of Sullivan county made an order that an election be held, at the usual voting places in said county, on the 22d of February, 1870, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan would assent to a subscription of $200,000 to the capital stock of said company, subject to certain conditions, among which are the following: Said railroad to be located and constructed through said Sullivan county from east to west on a line as near through the centre of said county as practicable, said subscription to be paid to said company * * * in the bonds of the county at par, * * * and that whenever said railroad company shall have surveyed and permanently located said road continuously through the State of Missouri from West Quincy, in Marion county, * * * to some point on the Missouri river opposite or near Brownsville, in the State of Nebraska, and should have continuously graded, bridged, and tied six miles of said railroad within Sullivan county upon the line * * * designated, then said county of Sullivan, by its county court, would issue and deliver to * * * said railroad company its bonds in payment of such subscription to the amount of $40,000, and for each additional section of six miles so continuously graded, bridged, and tied within said county of Sullivan said county would issue and deliver to the company an additional sum of $40,000 in the bonds of said county, as aforesaid, till the whole subscription of $200,000 should be paid.

It further appears that, in pursuance of law, a special registration of the qualified voters of said county who had become such since the last general registration and subsequent special registrations of the qualified voters of said county made prior thereto was had and held in the various municipal townships of said county prior to the holding of such special election; that at said special election, according to the official canvass thereof, 1,049 votes were cast in favor of the proposed subscription and 257 votes against it; that the county court of said county, on the day after said election, viz., on February 23, 1870, made an order that, as 1,049 voters of the county

had voted for the subscription and only 257 against it, therefore the proposition to subscribe for $200,000 of the stock of said railroad company had carried; and afterwards, in pursuance of an order of said court, the *ex officio* president thereof made a formal entry of such subscription on the books of the company.

On the trial defendants offered in evidence the registration books of Sullivan county made in 1868 for the general election of that year and for a special election in 1869 and the special election held on February 22, 1870. These books were identified by James Morris, clerk of the county court of said county, and F. E. Stone, one of the registration officers, testified as follows: "I have recently examined the registration books identified by Mr. Morris. They are the books used for the general election in 1868 and at the special elections in 1869 and 1870. They were prepared and arranged for use by W. B. Taylor, W. H. Custer, and myself (the then registration officers). The thirteen books now shown me were used at the special election held February 22, 1870. Mr. Custer made certified copies of the special registration of voters for the use of the judges of the election as soon as such registration was completed."

152 The registration books were then offered in evidence, to which objection was made; which being overruled, thereupon the defendants began to read from the registration book of Polk township, in said county, used at the special election, February 22, 1870; but before completing the reading thereof counsel for relator conceded that the registration books offered in evidence, counting all those registered for the general election of 1868 and those added in 1869 and those added for special election, February 22, 1870, contained the names of 1,940 persons as qualified to vote in said county at said election, and that said names were placed upon said books by the aforesaid registration officers and their predecessors in office for use in the general election of 1868, the special election of 1869, and the special election held February 22, 1870.

The controlling question arising on the record is as to the propriety of the action of the trial court in admitting in evidence the said registration books.

The objection to their admission was based mainly on the ground that after the election of February 22, 1870, the county court held that two-thirds of the qualified voters voting at said election had voted in favor of the subscription, and directed the subscription to be made, which was thereafter made. It is established law in this State that county courts are only the agents of the county, with no powers except what are granted, defined, and limited by law, and, like all other agents, they must pursue their authority and act within the scope of their powers. Wolcott *v.* Lawrence County, 26 Mo., 272; Book *v.* Earl, 3 West. Rep., 140; 87 Mo., 246; Sturgeon *v.* Hampton, 3 West. Rep., 844; 88 Mo., 203.

The power of the county court to subscribe to the stock of a railroad company was made by the constitution of 1865 and Gen. Stat., 1865, p. 338, § 17, to depend upon the fact that two-thirds of the qualified voters of the county at a regular or special election held therein should assent thereto.

In the case of State *v.* Brassfield, 67 Mo., 331, this statutory provision and the provision of the constitution of 1865 which gave origin to the statute for the first time came before this court for construction, and it is there distinctly held that under these provisions the fact that a majority of voters voting at an election held for the purpose of determining whether or not a subscription should be made to the stock of a railroad company voted in favor of the subscription was not sufficient to confer upon the county court the power to subscribe, but that, in order to the exercise of the power, it must appear that two-thirds of the qualified voters assented to the subscription by voting in favor of it, and that the mere inaction of such voters by failing to vote did not express such assent within the meaning of the constitution of 1865, art. 2, § 14.

So it was also held in the cases of Webb *v.* La Fayette County, 67 Mo., 353; Ranney *v.* Bader, *id.*, 476; State *v.* Walker, 85 Mo, 41.

It is also held in the case of State *v.* Brassfield and Ranney *v.* Bader, *supra*, that the registration books may be properly received in evidence for the purpose of establishing the number of qualified voters in the determination of the question whether or not at the election two-thirds of the qualified voters as ascertained by the registration assented to the subscription by voting for it.

Taking in this case the admission that the registration books offered in evidence contained the names of 1,940 persons as qualified to vote in said county at said election, it is evident that two-thirds of the qualified voters of the county of Sullivan did not assent to said subscription, as only 1,049 of said voters voted in favor of the subscription.

Besides this, while there was evidence tending to show that the railroad company has complied with the conditions of the subscription, there was also evidence to show that it had not complied, and the trial court might on this ground have well denied the relief asked.

The judgment, for the reasons given, is hereby affirmed with the concurrence of Brace and Sherwood, JJ.; Black, J., concurring in the result and Ray, J., absent.

E. H. NORTON, *C. J.*

153 And afterwards, to wit, on the 11th day of July, 1888, the following further proceedings were had in said cause, to wit:

STATE *ex Rel.* Q., M. & P. R'Y Co., Plaintiff in Error,
vs.
A. W. HARRISS, GEO. T. TODD, & THOMAS MONTGOMERY, Judges of the County Court of Sullivan County, Defendant- in Error.

Now, at this day, there is presented to the Honorable E. H. Norton, at chambers, a writ of error to reverse the judgment in the above cause, a citation directed to the said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States on the second Monday of October next; a supersedeas bond in the sum of five hundred dollars, and an assignment of errrors; which said writ of error is allowed, said citation signed,

and bond approved and ordered to be filed and made a part of the record herein.

Which said bond is in the words and figures as follows, to wit:

154 Know all men by these presents that we, The State of Missouri at the relation and to the use of the Quincy, Missouri and Pacific R. R. Co., as principal, and Amos Green, Henry Root, and William B. Larkworthy, as sureties, are held and firmly bound unto Anderson W. Harriss, Geo. T. Todd, and Thomas Montgomery, judges of the county court of Sullivan county, Missouri, in the full and just sum of five hundred dollars, to be paid to the said Anderson W. Harriss, George T. Todd, and Thomas Montgomery, county judges aforesaid; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-second day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at the April term, A. D. 1888, of the supreme court of the State of Missouri, in a suit depending in said court between The State of Missouri at the relation and to the use of the Quincy, Missouri and Pacific Railroad Company, plaintiff, and Anderson W. Harriss, George T. Todd, and Thomas Montgomery, judges of the county court of Sullivan county, Missouri, defendant-, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States to be held at Washington, D. C., on the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY,
By AMOS GREEN, *Vice-President.* [SEAL.]
[SEAL.] AMOS GREEN. [SEAL.]
HENRY ROOT. [SEAL.]
WILLIAM B. LARKWORTHY. [SEAL.]

Sealed and delivered in presence of—
—— ——.
—— ——.

Approved by—
E. N. NORTON,
Chief Justice Supreme Court of Missouri.

155 [Endorsed:] No. —. Supreme court of Missouri. State of Missouri *ex rel.*, &c., *vs.* A. W. Harriss *et al.* Appeal bond.

$—. Dated — day of ——, 18—. Filed 11th day of July, 1888. Henry W. Ewing, clerk, by Rowan Ray, D. C.

UNITED STATES OF AMERICA, } *sct:*
State of Illinois, County of Adams, }

Before me, the undersigned, a notary public in and for the county of Adams, State of Illinois, personally appeared Amos Green, Henry Root, and William B. Larkworthy, to me well known, who upon oath state that they are each worth, over and above his indebtedness, the sum of five thousand dollars, and that they each own real property to that amount subject to execution in Adams county, in State of Illinois.

AMOS GREEN.
HENRY ROOT.
WILLIAM B. LARKWORTHY.

Subscribed and sworn to before me this 23d day of June, 1888.
JOSEPH N. CARTER,
Notary Public. [SEAL.]

UNITED STATES OF AMERICA, } *sct:*
—— *District of* ——, }

Before me, —— ——, personally appeared —— ——, who upon oath state that — worth, over and above — indebtedness, the sum of —— dollars, and that — own real property to that amount subject to execution in ——.

—— ——.

Subscribed and sworn to before me this — day of ——, 18—.
—— ——,
—— ——.

UNITED STATES OF AMERICA, } *sct:*
Western District of Missouri, }

I do hereby certify that the parties subscribing the within bond are respectively over the age of twenty-one years and are competent to contract, and that their signatures to said bond are genuine. I further certify that said bond is good and sufficient.

Witness my hand — this — day of ——, 187–.

—— ——,
—— ——.

156 STATE OF MISSOURI, *sct:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, do hereby certify the above and foregoing to be a full, true, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remains of record and on file in my said office.

Seal of the Supreme Court of Missouri.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in the city of Jefferson, State aforesaid, this 22d day of September, A. D. 1888.

HENRY W. EWING, *Clerk*,
By ROWAN RAY, *D. C.*

Endorsed on cover: Missouri supreme court. No. 256. The State of Missouri at the relation and to the use of the Quincy, Missouri, & Pacific Railroad Company, plaintiff in error, *vs.* Anderson W. Harris, George T. Todd, and Thomas Montgomery, judges of the county court of Sullivan county, Missouri. Filed October 16, 1888.

SUPREME COURT U. S.
FILED.
FEB 5 1892
JAMES H. McKENNEY,
CLERK.

NO. 256.

Supreme Court of United States.

October Term, 1891.

THE STATE OF MISSOURI, AT THE RELATION AND TO THE USE OF THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
–AGAINST–
ANDERSON W. HARRIS ET AL., JUDGES OF THE SULLIVAN COUNTY COURT,
Defendants in Error.
} MANDAMUS.

ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT OF THE CASE, ASSIGNMENT OF ERRORS, AND BRIEF FOR PLAINTIFF IN ERROR.

JNO. P. BUTLER,
For Plaintiff in Error.

MILAN, MO.
"STANDARD" BOOK AND JOB PRINT.
1892.

NO. 256.

SUPREME COURT OF THE UNITED STATES

October Term, 1891.

THE STATE OF MISSOURI, AT THE RELATION AND TO THE USE OF THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
—AGAINST—
ANDERSON W. HARRIS ET AL., JUDGES OF THE SULLIVAN COUNTY COURT,
Defendants in Error.
} MANDAMUS.

Error to the Supreme Court of Missouri.

STATEMENT OF CASE FOR PLAINTIFF IN ERROR.

The Quincy, Missouri and Pacific Railroad Company was organized under the General laws of the State of Missouri, June 29th, 1869, for the purpose of building a Railroad from West Quincy, in Marion County, Missouri, westerly by the

most practicable route to a point on the Missouri River opposite Brownsville, Nebraska. (Printed Record, pp. 57–61.)

At that time all that part of Missouri lying North of the Hannibal and St. Joseph Railway, and a great part of Southern Iowa was devoid of Railroad facilities, and the people of the then sparsely settled portion of Missouri were strongly anxious to procure further Railroad facilities, as in fact the people of the whole State were, and this anxiety permeated Legislation and made itself felt in Constitutional Conventions.

Up to the time of the adoption of the Constitution of 1865, the Legislature had been left free to act, in the matter of giving State aid to the building of Railroads, and in authorizing counties, cities and towns to donate public monies for the like purpose.

An abuse of this power, led the Constitutional Convention of 1865 to provide as follows:

"The General Assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless *two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto.*" (§ 14, Art. 11, Cons't. of 1865.)

In pursuance of this constitutional declaration, the Legislature of Missouri, under the Revised Statutes of 1865, provided as follows:

"It shall be lawful for the County Court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city or town in, or loan the credit thereof to any Railroad Company duly organized under this or any other law of the State; *provided, that two-thirds of the qualified voters of such county, city or town,*

at a regular or special election to be held therein, shall assent to such subscription." (Gen'l. Stat. of 1865, Chap. 63, § 17.)

However, prior to the adoption of the Constitution and the enactment of the provisions of the Statute cited, the Supreme Court of Missouri, in the case of *State vs. Winkelmeier*, 35, Mo. 103, decided in 1864, under a Statute requiring "a majority of the legal voters of the city" of St. Louis to sanction the sale of refreshments on Sunday, held that, the true construction of the act, required a majority of the voters participating in the election at which the vote was taken.

A similar question was presented to the Supreme Court of Missouri at its February Term, 1866, in the case of the State at the relation of *Bassett vs. St. Joseph*, 37 Mo. 270, in which under an act requiring all propositions "to create a debt by borrowing money," to be submitted "to a vote of the qualified voters of the city" and that in all such cases it should require "two-thirds of such qualified voters to sanction the same" and in deciding the case the Court said, "We think it was sufficient that two-thirds of all the qualified voters who voted at the special election, authorized for the express purpose of determining that question, on public notice duly given, voted in favor of the proposition. This was the mode provided by law for ascertaining the sense of the qualified voters of the city upon that question. There would appear to be no other practicable way in which the matter could be determined."

Again at the October Term 1866, the Supreme Court of Missouri in the case of *State vs. Binder*, 38 Mo. 456, was again called upon to construe the St. Louis refreshment act which had been previously considered in the *Winkelmeier* case.

After referring to the cases of *State vs. Winkelmeier* and

State vs. St. Joseph, the Court quoted and approved the doctrine enunciated in the Bassett case, and then says:

"And certainly, in the absence of any evidence to the contrary, it may be presumed that the voters voting at an election so held, were all the legal voters of the city; *or, that all those who did not see fit to vote, (if there were any,) acquiesced in the action of those who did vote, and so are to be considered as equally bound and concluded by the result of the election.*"

This construction had been so universally adopted and acknowledged, that the Legislature of Missouri, in the act known as the Township Aid Act, approved March 23, 1868, gave to the constitutional provision cited the like legislative construction by using in that act, in accordance with the foregoing decisions, synonymous words to those used in the Constitution and General Statutes of 1865, viz: "*Two-thirds of the qualified voters of such township, voting at such election.*"

Following these Judical and Legislative constructions, at the October Term 1869, the Supreme Court of Missouri in the case of *The State vs. Linn County*, 44 Mo. 504 evidently considered the language used by the Township Aid Act, as synonymous to the language used in the Constitution, and that this question had been settled by the previous adjudications to which reference has been made.

Such was the state of the law at the time Sullivan County, Missouri, made the subscription to the Quincy, Missouri and Pacific Railway Company.

The Railway Company immediately upon its organization on the 29th day of June, 1869, began the work of construction of its proposed line and began to solicit subscriptions from the counties, townships and other manicipalities along its route. On the 22d day of December, 1869, the County

Court of Sullivan County, ordered a special election to be had and held in and throughout the several voting precincts of said county, "on the 22 day of February, 1870, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan would assent to a subscription in the sum of $200,000 to the capital stock of the Quincy, Missouri and Pacific Railway Company subject to the following conditions: Said Railroad to be located and constructed through said Sullivan county from East to West, on a line as near through the center of said county as practicable, said subscription to be paid to said company in the bonds of said county at par, * * * * and whenever said company should have surveyed and permanently located its road continuously through the State, and should have continuously *graded*, *bridged and tied* six miles of said Railroad within Sullivan county aforesaid, its County Court would issue and deliver to the Railway Company, its bonds in payment of such subscription to the amount of $40,000, and for each additional section of six miles, so continuously *graded*, *bridged and tied* within said county of Sullivan, said county would issue and deliver to said company an additional sum of $40,000 in the bonds of said county until the whole subscription should be paid up, etc. (P. R. pp. 18–19.)

An election was held in accordance with the terms of such order on the 22 day of February, 1870, and on the 23 day of February, 1870, the result was duly canvassed according to law, and found to be 1049 votes in favor of the subscription and 257 votes against the same, whereupon it was declared by the County Court that Sullivan county had voted in favor of such subscription, and ordered the President and Clerk of said Court to enter such subscription of $200,000 upon the stock books of said company and also, upon the

records of the County Court. (P. R. p. 19.)

Afterwards on the 5 day of April, 1871, in accordance with the before mentioned proceedings, such subscription was entered upon the stock books of said company. (P. R. pp. 20-21-22-23.)

The building of the Railway continued from West Quincy, in Marion county, Missouri, the point of commencement and continued westerly until the same was completed to the town, now city of Kirksville, Adair county, Missouri, in the year 1873, a distance of sixty-five miles, when the enterprise was temporarily suspended on account of the financial panic of that year.

In 1877 work was again resumed from Kirksville westerly, and the Railroad located to the city of Milan, the county seat of Sullivan county, one hundred and five miles West from West Quincy, and more than twelve miles of said Railroad was *graded*, *bridged* and *tied* within the last named county prior to the 29th day of June, 1879. (P. R. p. 25.)

And the same was located, completed and in operation to the city of Milan, a distance of 17 miles within said county on the 1 day of June 1880, on the line previously projected. (P. R. p. 24.)

The Railway Company thereupon tendered to the Sullivan County Court certificates of stock for 800 shares of the capital stock of said Railway company and demanded the issue of the first two installments of bonds in accordance with the order of subscription, and the then County Court refused to issue them. (P. R. p. 26.)

The general Statutes of Missouri relating to Railroad companies provides as follows:

"Any County Court, city council or trustees of any town, refusing to perform any of the duties required of them

by this chapter, may be proceeded against by writ of *Mandamus*, to be sued out of the Circuit Court of the county. (§ 22, Article II., I. Wagner's Stat. p. 306.)

In 1879, in consequence of a Missouri Statute of ten year limitation, the Railway Company in order to secure an extension of their charter, was compelled to relinquish all subscriptions remaining unearned after the 29 day of June 1879. In compliance therewith, the Railway Company released their claim to the last three installments amounting to $120,000, leaving the first two installments amounting to $80,000 as the only bonds in controversy.

On the 7th day of April 1881, the Railway Company filed in the Circuit Court of Sullivan county Missouri, its petition for an alternative writ of *Mandamus* asking that the defendants in error, the Judges of the Sullivan County Court, be compelled to issue and deliver to the plaintiff in error the first two installments of bonds aggregating the sum of $80,000. (P. R. p. 5.)

Afterwards on the 10th day of August 1881, an alternative writ of *Mandamus* and summons was issued, which was returned served on the 16th day of September 1881.

On the 15 day of May 1882, the Hon. G. D. Burgess Judge of the Sullivan County Circuit Court issued his amended alternative writ of Mandamus. (P. R. pp. 5–11.)

And on the 19th day of May 1882, the defendants in error filed return thereto. (P. R. pp. 11–13.)

To this answer or return the plaintiff in error filed a general denial. (P. R. p. 13.)

And upon the issues thus made the cause came on for trial at the November Term Nov. 27, 1882, of the Sullivan County Circuit Court.

On the trial of the case the plaintiff in error gave in evidence

1. Its articles of association dated June 29, 1869. (P. R. pp. 16–17.)

2. The order of the Sullivan County Court dated Dec. 22, 1869, submitting the question of subscription to the voters of the county. (P. R. pp. 18–19.)

3. The order of the County Court declaring the result of such special election. (P. R. p. 19.)

4. The order of the County Court making the subscription. (P. R. p. 20.)

5. The evidence of Edward McCabe identifying the subscription books of the Railway Company, and such subscription books themselves, showing the entry of the subscription by Sullivan county upon the stock books of said company. (P. R. pp. 21–3.)

6. Volume 2, of the records of the Railway Company showing the location of said Railway upon the projected line mentioned in the order of subscription. (P. R. pp. 23–4.)

7. Parol testimony of E. M. Collins, Chief Engineer of said Company, and others showing the completion of the Railway, in the time, and according to the stipulations and conditions of the order or contract of subscription.

Also, evidence showing a demand for the issue of the first two installments of bonds; a tender of certificates of stock, and a refusal by the County Court to issue the bonds or accept the certificates of stock and rested the case. (P. R. pp. 25–6.)

The defendants in error, thereupon asked an instruction, in the nature of a demurrer to the evidence, which the Court refused.

1. The defendant in error, to sustain the issues on his part, introduced Joshua Gray et al, as witnesses who gave testimony tending to prove a non compliance with the contract.

2. The evidence of W. H. Custer, and F. E. Stone, showing a special registration prior to the special Railroad election Feb'y 22, 1870.

3. The evidence of James Morris; that he was Clerk of the County Court of said county, and that the registration books shown him (some 13 in number) were the registration books of 1868, and subsequent special registrations of 1869 and 1870. (P. R. pp. 26–7.)

4. The defendant in error thereupon offered the entire mass of registration books and copies thereof in evidence.

To the instruction of which the plaintiff in error objected.

1. * * 2. * * 3. * * 4. * * 5. *Because the best evidence of the number of qualified voters in said county at the time of the making of such subscription, is found in the whole number of votes cast at the special election so held to ascertain the sense of the voters of said county.*

6. Because, although such registration books might show a larger number of persons registered during the general registration of 1868, and subsequent special registrations Sept. 2, 1869, and February 17, 1870, than voted at such special election, yet it would not be any evidence that such persons whose names were so found on such registry lists were qualified voters at the time of the election unless they actually voted.

7. Because the record discloses the fact that the County Court ordered an election, which, after due notice, was lawfully held; that the poll books and returns were canvassed by the County Clerk and Judges, and the result judicially de-

lature to impair the validity of the contract in question by legislative enactment, and courts can not by judicial construction do those things which the organic law prohibits the Legislature from doing, and thus by such judicial construction, to impeach and impair the contract in question by overruling and overriding the former decisions of the same court, when contracts have been made and rights become vested by reason of such former decisions.

As the effect of the evidence offered is, in a collateral way, to impeach and impair the validity of the contract in question, which has been, in good faith, wholly executed by the relator company, such books ought not to be admitted for any such purpose. (P. R. pp. 28–30.)

These several objections were by the Court overruled, and the registration books admitted in evidence, to which action of the Court the relator at the time excepted.

After these several objections were overruled, the registration books were admitted in evidence and the defendant in error began to read therefrom, when the plaintiff in error, to avoid the reading of this great mass of documentary evidence, "conceded that such registration books, counting, all those registered prior to the general election of 1868, those added in 1869, and those added for the special election February 22, 1870, contained the names of 1,940 registered voters, and that said names were placed upon said books, by the aforesaid registering officers and their predecessors in office, for use in the general election of 1868, the special election of 1869, and special election held February 22, 1870."

The defendants in error thereupon rested their case. (P. R. p. 30.)

The plaintiff in error thereupon introduced evidence in rebuttal.

1. E. M. Collins, Chief Engineer was recalled and testified, that the *grading*, *bridging* and *tieing* of the first 12 miles in Sullivan county cost $16,000 per mile.

2. Edward McCabe, General Attorney was recalled and testified that the Railroad Company in good faith relied upon this subscription, and that until after the Railroad was completed no question was ever made or mooted but that, "two-thirds of the qualified voters of said county had voted in favor of such subscription."

3. An abstract of the votes cast at the general election of 1868.

When the defendants in error conceded that the highest number of votes cast at that election was 1496.

4. An abstract of the votes cast at the general election in Nov. 1870.

When the defendant in error conceded that the highest number of votes cast in said county at said election was 1508.

5. A proposition from the County Court dated August 27, 1879, offering to issue and deliver the $80,000 in bonds upon certain conditions therein mentioned, which on objection was excluded by the Court. (P. R. pp. 30–2.)

This was all the evidence offered on the part of either party, whereupon the relator asked the Court to declare the law as follows:

1st. If, from the evidence, the Court finds that on 22d day of December, 1869, the County Court of Sullivan county, Missouri, did order a special election to be holden in the several election precincts of said county on the 22d day of February, 1870, to ascertain the sense of the voters of said county; whether said county should subscribe $200,000 to the capital stock of said Railroad Company upon the conditions in such

order prescribed; that in pursuance of said order an election was duly held and the poll books and returns of said election duly canvassed, and declared that 1,049 voters, voting at such election, voted in favor of the same, and 257 voters voted against the same, and that the County Court, acting in pursuance of said vote, declared such subscription carried, and entered the same upon the stock books of said company, and that said company had continuously surveyed and permanently located its said road from West Quincy in Marion county, Mo., to the eastern boundary of Sullivan county, and that from such terminal point, the said company, prior to June 29, 1879, continuously graded, bridged and tied twelve miles within said county, prior to the filing of the petition for the alternative writ in this cause, then, in that event, the Court declares the law to be that, relator is entitled to have and receive from said county the first two installments of bonds mentioned in the contract of subscription, and the peremtory writ must issue.

2d. The Court further declares the law to be, that if, from the evidence, the Court believes that an election was ordered by the County Court, that such election on due notice was lawfully held, that the poll books and election returns were canvassed by the County Clerk and County Judges, and that thereupon and thereafter the County Court, acting in the premises, declared that more than two-thirds of the qualified voters of said county had assented to such subscription, and made and entered a subscription upon the stock books of the Quincy, Missouri and Pacific Railroad Company in pursuance of such vote, and that thereafter the said company, relying in good faith upon such subscription, substantially completed its road twelve miles within said county, on the line contemplated by the order of subscription, then, in that event, the county

is estopped from denying the want of power to issue said bonds, and the judgment of the Court must be for the relator, and the peremptory writ must issue.

3d. If, from the evidence, the Court believes that on the 22d day of Dec., 1869, the County Court of Sullivan county did order an election on the 22d day of February, 1870, to determine the sense of the qualified voters of said county whether the County Court should subscribe $200,000 to the capital stock of the Quincy, Missouri and Pacific Railroad Company, upon the conditions in such order of subscription contained, that an election was held at such time, that, 1,049 voters voted therefor, and 257 votes against the same, then, the Court declares the law to be, that 1,049 votes constitutes more than two-thirds of the qualified votes of said county as required by law, and their assent to such subscription created a valid power in said County Court, to make such subscription, and if the Court further finds that such subscription was actually made thereunder, and that there has been a substantial compliance with such contract or order of subscription prior to the filing of the petition for the alternative writ, by the Railroad Company, then the judgment of the Court must be for the relator and the peremptory writ will issue.

4th. Although it is conceded that the registration lists of 1868, with the names added by the registration officers at a special registration held September 2, 1869, and the subsequent special registration held February 17, 1870, for the purposes of such special elections, shows a larger number of persons than those voting at such special election. Yet such fact is not evidence that they were qualified voters on the 22d day of February, 1870, unless they actually presented themselves for the purpose of voting at such election, and voted or

offered to vote, and is insufficient to overthrow the presumption that all the qualified voters of said county voted at such special election."

The Court thereupon refused and declined to declare the law as requested by the relator, to which action of the Court in so refusing to declare the law as requested, the relator at the time excepted. (P. R. pp. 32–4.)

The Court thereupon found the issues for the respondents, and rendered judgment against the relator in accordance with such finding, which said judgment after the entitlement of the cause is as follows:

"Now, to wit, November 27, 1882, the application of the relator for the issue of a peremptory writ of mandamus herein comes on for final hearing and determination upon the allegations of the alternative writ of mandamus, heretofore issued herein, the denial of the allegations therein on the part of respondents, and the replication on the part of relator. The relator appearing by its attorneys and as well also the respondents by their attorneys and the respective parties answering ready for trial, the Court proceeds to hear the testimony offered on the part of the relator and as well also the evidence on the part of the respondents, and the Court, being advised as to the law and fact arising thereupon, doth find that the contract of subscription between Sullivan county, Missouri, and the relator company was made substantially in manner and form as alleged in the allegations of the alternative writ. *The Court further finds from the evidence that prior to the 29th day of June, 1879, and prior to the filing of the petition for the alternative writ of mandamus herein, the relator's company had substantially complied with the conditions of said contract of subscription by the completion of said Railway according to the terms thereof.*

The Court further finds from the evidence that there were 1,306 votes cast at the special election held in said county to determine the sense of the voters as to whether the County Court should or should not make said subscription; that 1,049 votes were cast in favor of said subscription and 257 votes against the same; that more than two-thirds of the qualified voters of said county voting at such election voted in favor of such subscription, but the Court further finds from the registration books of said county offered in evidence that there were 1,940 persons duly registered as qualified voters in said county at the time of said election.

Wherefore the Court finds, adjudges, and decrees that two-thirds of the qualified voters of said county did not vote in favor of such subscription, and that by reason thereof there was a want of a valid power existing in the County Court of said county to make the contract of subscription in question.

It is therefore considered, adjudged, and decreed by the Court here that the relator's application for a peremptory writ of mandamus be denied, that the alternative writ issued herein be dismissed, that the respondents go hence without day, and that they have and recover from the relator's company their costs in this suit laid out and expended, taxed at the sum of — dollars and — cents, and that they have execution therefor." (P. R. p. 14.)

On the same day plaintiff in error filed its motion for a new trial, which after its entitlement, and omission of signature is as follows:

1. "Because the finding and judgment of the Court is for the wrong party. It should have been for the relator instead of respondents.

2. Because the finding and judgment of the Court is

against the evidence, against the law, and against the law and evidence.

3. Because the Court admitted improper and illegal evidence on the part of respondents, against the objections of the relator, and excluded proper and legal testimony offered on the part of said relator.

4. Because the Court erred in refusing to declare the law as asked in relator's instructions numbered one (1), two (2), three (3), and four (4.)

5. Because the judicial declarations and ascertainment that more than two-thirds of the qualified voters of said county voted in favor of such subscription conferred a valid power upon the Sullivan County Court to make the contract in question; and, the contract of subscription given in evidence having been wholly executed on the part of relator, the Court erred in admitting testimony on the part of respondents tending to impeach, impair, vary, or modify the contract in question to the injury of the relator.

6. Because at the time of the making of the contract in question the Supreme Court of Missouri, in the cases of The State *ex rel.* Bassett *vs.* Renick, Mayor of St. Joseph (37 Mo. Rep., 270), State *vs.* Binder (38 Mo. Rep., 450), The State *ex rel.* N. M. C. R. Co. *vs.* Linn Co. (44 Mo. Rep., 504), and other cases, extending from 1864 to 1872, had judicially declared and construed the phrase "two-thirds of the qualified voters of the county, city, or town" to mean the same thing as and was equivalent to, "two-thirds of the qualified voters of such county, city, or town voting at an election," &c.; and, such being the judicial interpretation thereof, the Legislature of the State of Missouri, in the act approved March 23rd, 1868, known as the Township Aid Act, adopted the same,

and therein used the words "two-thirds of the qualified voters of such township voting at such election" as synonymous with and equivalent to, the words used in the Constitution and General Statutes, and under such authorative construction, the contract in question was made and in good faith executed on the part of the relator company, hence the judgment of the Court impeaches and impairs the validity of said contract so made and executed. Wherefore the relator says that the judgment of the Court is erroneous, in that, it is in violation of section 28 of the declaration of rights of the Constitution of 1865, and in violation of section 10 of article I of the Constitution of the United States."

The motion for a new trial being overruled, the relator excepted and on the same day, plaintiff in error filed its motion in arrest of judgment covering the same substantial grounds as the motion for a new trial, which was likewise overruled, and exceptions saved to the ruling of the Court, whereupon at the same time, it tendered its bill of exceptions, which were signed sealed and entered of record. (P. R. pp. 78-9-80.)

On the 12 day of November, 1885, the plaintiff in error sued out of the Supreme Court of Missouri, its Writ of Error of that date, directed to the Judge of the Sullivan County Circuit Court, requiring a certified transcript of the proceedings in this cause, to be certified to that Court for its determination.

In compliance with such mandate on the 23 day of March 1886, a transcript was filed in the Supreme Court of Missouri. (P. R. p. 4.)

In said Supreme Court of Missouri the plaintiff in error alleged and assigned the following grounds of error, viz.:

I.

The Court below erred in permitting the respondents to read in evidence, against the objections of the relator, the registration books used at the general election of 1868, and the subsequent special elections held in the years 1869 and 1870.

II.

The Court below erred in refusing to declare the law as requested by the relator in its instructions, numbered one, two, three and four.

III.

The Court below erred in rendering judgment in favor of the respondents, the judgment should have been in favor of the relator and the peremptory writ issued.

IV.

The judgment of the Court below is erroneous in that it impeaches, impairs and invalidates the contract of subscription lawfully made between Sullivan county and the relator company, and therein, is in violation of the rights of relator under section 10, of article I, of the Constitution of the United States.

V.

The Court below erred in overruling relator's motion for a new trial and in arrest of judgment, and in refusing such new trial, or to arrest the judgment therein. (P. R. p. 45.)

On these assignments of error issue was joined and the cause submitted to the Court on briefs April 21, 1888, and on the 18 day of June, 1888, the Supreme Court rendered a judgment affirming the judgment of the Sullivan County Circuit Court, and delivered the following:

OPINION OF THE COURT.

This is a proceeding by mandamus to compel the Judges of the County Court of Sullivan county to issue $80,000 of bonds to the Quincy, Missouri & Pacific Railroad Company, upon the trial of which judgment was rendered for defendants from which plaintiff has prosecuted a writ of error.

The record discloses the following facts: That the Quincy, Missouri & Pacific Railroad Company was, on the 29th day of June, 1869, duly incorporated under the laws of this State for the purpose of building and operating a Railroad from West Quincy, on the Mississippi river, in Marion county, to a point on the Missouri river, in Atchison county, Missouri, opposite the city of Brownsville, Nebraska; that on the 22d of December, 1869, the County Court of Sullivan county made an order that an election be held, at the usual voting places in said county, on the 22d of February, 1870, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan would assent to a subscription of $200,000 to the capital stock of said company, subject to certain conditions, among which are the following: Said Railroad to be located and constructed through said Sullivan county from East to West on a line as near through the centre of said county as practicable, said subscription to be paid to said company * * * in the bonds of the county at par, * * * and that whenever said Railroad company shall have surveyed and permanently located said road continuously through the State of Missouri from West Quincy, in Marion county, * * * to some point on the Missouri river opposite or near Brownsville, in the State of Nebraska, and should have continuously graded, bridged, and tied six miles of said Railroad within Sullivan county upon the line * * * designated, then said county of Sullivan, by its County Court, would issue and deliver to

* * * said Railroad company its bonds in payment of such subscription to the amount of $40,000, and for each additional section of six miles so continuously graded, bridged, and tied within said county of Sullivan said county would issue and deliver to the company an additional sum of $40,000 in the bonds of said county, as aforesaid, till the whole subscription of $200,000 should be paid.

It further appears that, in pursuance of law, a special registration of the qualified voters of said county who had become such since the last general registration and subsequent special registrations of the qualified voters of said county made prior thereto was had and held in the various municipal townships of said county prior to the holding of such special election; that at said special election, according to the official canvass thereof, 1,049 votes were cast in favor of the proposed subscription and 257 votes against it; that the County Court of said county, on the day after said election, viz., on February 23, 1870, made an order that, as 1,049 voters of the county had voted for the subscription and only 257 against it, therefore the proposition to subscribe for $200,000 of the stock of said Railroad company had carried; and afterwards, in pursuance of an order of said Court, the *ex-officio* president thereof made a formal entry of such subscription on the books of the company.

On the trial defendants offered in evidence the registration books of Sullivan county made in 1868 for the general election of that year and for a special election in 1869 and the special election held on February 22, 1870. These books were identified by James Morris, Clerk of the County Court of said county, and F. E. Stone, one of the registration officers, testified as follows: "I have recently examined the registration books identified by Mr. Morris. They are the books

used for the general election in 1868 and at the special elections in 1869 and 1870. They were prepared and arranged for use by W. B. Taylor, W. H. Custer, and myself (the then registration officers). The thirteen books now shown me were used at the special election held February 22, 1870. Mr. Custer made certified copies of the special registration of voters for the use of the Judges of the election as soon as such registration was completed."

The registration books were then offered in evidence, to which objection was made; which being overruled, thereupon the defendants began to read from the registration book of Polk township, in said county, used at the special election, February 22, 1870; but before completing the reading thereof counsel for relator conceded that the registration books offered in evidence, counting all those registered for the general election of 1868 and those added in 1869 and those added for special election, February 22, 1870, contained the names of 1,940 persons as qualified to vote in said county at said election, and that said names were placed upon said books by the aforesaid registration officers and their predecessors in office for use in the general election of 1868, the special election of 1869, and the special election held February 22, 1870.

The controlling question arising on the record is as to the propriety of the action of the trial court in admitting in evidence the said registration books.

The objection to their admission was based mainly on the ground that after the election of February 22d, 1870, the County Court held that two-thirds of the qualified voters voting at said election had voted in favor of the subscription, and directed the subscription to be made, which was thereafter made. It is established law in this State that County Courts are only the agents of the county, with no powers ex-

cept what are granted, defined, and limited by law, and, like all other agents, they must pursue their authority and act within the scope of their powers. Wolcott *vs.* Lawrence County, 26 Mo. 272; Book *vs.* Earl, 3 West. Rep., 140; 87 Mo. 246; Sturgeon *vs.* Hampton, 3 West. Rep., 844; 88 Mo. 203.

The power of the County Court to subscribe to the stock of a Railroad company was made by the Constitution of 1865 and Gen. Stat., 1865, p. 388, § 17, to depend upon the fact that *two-thirds of the qualified voters of the county at a regular or special election held therein should assent thereto.*

In the case of State *vs.* Brassfield, 67 Mo. 331, this statutory provision and the provision of the Constitution of 1865 which gave origin to the statute for the first time came before this Court for construction, and it is there distinctly held that under these provisions the fact that a majority of voters voting at an election held for the purpose of determining whether or not a subscription should be made to the stock of a Railroad company voted in favor of the subscription was not sufficient to confer upon the County Court the power to subscribe, but that, in order to the exercise of the power, it must appear that two-thirds of the qualified voters assented to the subscription by voting in favor of it, and that the mere inaction of such voters by failing to vote did not express such assent within the meaning of the Constitution of 1865, art. 2, § 14.

So it was also held in the cases of Webb *vs.* La Fayette County, 67 Mo. 353; Ranney *vs.* Bader, *id.*, 476; State *vs.* Walker, 85 Mo. 41.

It is also held in the case of State *vs.* Brassfield and Ranney *vs.* Bader, *supra*, that the registration books may be properly received in evidence for the purpose of establishing

the number of qualified voters in the determination of the question whether or not at the election two-thirds of the qualified voters as ascertained by the registration assented to the subscription by voting for it.

Taking in this case the admission that the registration books offered in evidence contained the names of 1,940 persons as qualified to vote in said county at said election, it is evident that two-thirds of the qualified voters of the county of Sullivan did not assent to said subscription, as only 1,049 of said voters voted in favor of the subscription.

Besides this, while there was evidence tending to show that the Railroad company has complied with the conditions of the subscription, there was also evidence to show that it had not complied, and the trial court might on this ground have well denied the relief asked.

The judgment, for the reasons given, is hereby affirmed with the concurrence of Brace and Sherwood, JJ.; Black, J., concurring in the result and Ray, J., absent. (P. R. pp. 81–4.) E. H. NORTON, *C. J.*

On the 20 day of June, 1888, the plaintiff in error, made application to the Clerk of the United States Circuit Court for the Central Division of the Western District of Missouri for a writ of error to be directed to the Honorable, the Judges of the Supreme Court of Missouri, requiring them to certify the record and proceedings in this cause, to this Court.

The writ of error having been duly issued the same was presented to E. H. Norton, Chief Justice, on the 28 day of June, 1888, who thereupon issued a citation to the defendants in error requiring them to appear at the October Term, 1888, of this Court to show cause &c., and such citation was duly served on the 30 day of June, 1888. (P. R. pp. 1–2.)

Afterwards on the 11 day of July, 1888, the plaintiff in error gave bond, in the sum of five hundred dollars conditioned as required by law, which was approved and filed with the Clerk of that Court on the same day.

In accordance with the command of this writ of error, a duly certified transcript of the record and proceedings in this cause was thereupon certified to, and filed in this Court on the 16 day of October, 1888. (P. R. pp. 84–7.)

At the time of the making of the application for the writ of error in this cause to this Court, from the judgment of the Supreme Court of Missouri, plaintiff in error filed and now reasserts the following:

ASSIGNMENT OF ERRORS.

I.

The Court below erroneously rendered judgment for the respondents when the same should have been for the relator, and therein the Supreme Court of Missouri erred in affirming said judgment.

II.

The Court below erroneously permitted the respondents to read in evidence, against the objections of the relator, the registration books used at the general election of 1868 and the subsequent special elections held in the year 1869 and 1870, and the Supreme Court of Missouri in that regard erred in affirming the said judgement.

III.

A proper construction of section 14 of article XI of the Constitution of Missouri of 1865, authorizing counties, cities, and towns to become stockholders in and to loan their credit to Railroad and other companies and associations is that two-thirds of the qualified voters of such county, city, or town who may vote at a general or special election called for the purpose of determining the sense of the voters thereof shall assent thereto.

Wherefore the judgment of the Court below, herein affirmed by the Supreme Court of Missouri, construing the aforesaid constitutional provision to require the affirmative

vote of two-thirds of the entire number of persons appearing upon the registration lists as qualified voters, whether voting or not, is erroneous, in that such judgment impeaches, impairs, and invalidates the contract of subscription between the county and the relator company, and therein is in violation of and contrary to the provisions of section 10 of article I of the Constitution of the United States and violative of the relator's rights thereunder. (P. R. p. 3.)

BRIEF AND ARGUMENT.

I.

The Court below erroneously rendered judgment for the respondents when the same should have been for the relator, and therein the Supreme Court of Missouri erred in affirming said judgment.

The Constitution of Missouri of 1865, and the general laws passed pursuant thereto, authorized the making of the contract of subscription, provided, "*two-thirds of the qualified voters of such county, city or town at a regular or special election to be held therein, shall assent thereto.*"

§ 14, Art. II., Const. 1865.
§ 17, Art. II., I Wag. Stat. p. 305.

And *Mandamus* is the proper remedy to enforce contracts made thereunder.

§ 22, Art. II., I, Wag. Stat. p. 306.

These constitutional and statutory provisions have been set out in full in the statement of the case, (pp. 2–7) and counsel for plaintiff in error deems it unnecessary to repeat them here.

Under these constitutional and statutory provisions, by virtue of an order of the County Court of Sullivan county, and of public notice duly given, an election was held on the 22 day of February, 1870, to determine the sense of the voters of that county, as to whether a subscription of $200,000 should be made to the Quincy, Missouri and Pacific Railroad company.

More than two-thirds of the qualified voters of said county, *voting at such election*, voted in favor of making such subscription.

Pursuant to the result of such election, duly canvassed and declared, the County Court made the contract of subscription, and entered the same on the stock books of the relator company, on the 5 day of April, 1871, and the latter immediately entered upon the performance of the conditions required in such contract, and prior to the issue of the alternative writ of *Mandamus* had not only *graded*, *bridged* and *tied* its Railroad a distance of 12 miles within Sullivan county, but had built and completed the same, and had it fully equipped and in operation from West Quincy in Marion county to Milan in Sullivan county, a distance of 105 miles from the point of commencement; 17 miles of which extended from the East line of Sullivan county to Milan the county seat thereof, at an expense of over $2,000,000.

After the Railway company in good faith, at an expense of many millions of dollars had fully executed its part of this contract of subscription, and demanded the bonds to which it was entitled, it was for the first time met with the proposition, that the County Court had no right to make the contract, because two-thirds of the registered voters of the county, had not actually voted therefor, notwithstanding the fact, that more than two-thirds of the qualified voters actually voting at the election had voted in favor of the subscription.

True it is, that in most cases of this character, the bonds are first issued, and the Railroad built or not built, as may suit the wishes of the receiver of the bonds, but the bonds are always upheld on the grounds of a "good faith," presumed, yet oftentimes it is a mere technical "good faith," wanting in good conscience.

What greater "good faith" can possibly exist, than that shown by the projectors of this line of Railway, who rely upon Sullivan county's subscription and spend millions of dollars to comply with the contract, under which they are to receive it?

In the case at bar, it is a good faith proven by the evidence in the record, and does not rest in presumption.

The Railway company engaged in this enterprise through a series of years. In the meantime Sullivan county looks complacently on, and serenely views the vast expense entailed, until she receives the fruits, and enjoys benefits which cannot be taken away, and then for the first time refuses to execute the contract by why which such benefits were obtained.

No greater "good faith" could exist on the part of the Railway company, and no greater "bad faith" can exist on the part of the county.

Nor would the enforcement of the payment of this subscription work any hardship upon the county, for as has been seen $120,000 of this subscription has been released. As a matter of history the county has already collected over $30,000 in taxes off this property, and should it, by this proceeding, be compelled to pay the $80,000 demanded, by the law of Missouri, it would be entitled to retain all State and county taxes levied thereon, until the subscription was paid, and thereafter the entire taxes State and county would go to the county school fund for the maintenance of the public schools of that county.

And while the question of good faith, resting on the proof in this record, ought to determine the question at issue favorably to the plaintiff in error, yet it does not rely upon this issue alone, but on the contrary, confidently asserts that at the time of the making of this contract of subscription, it was

the settled law of Missouri, "*that all those who did not see fit to vote, if there were any, acquiesced in the action of those who did vote, and so are to be considered as equally bound and concluded by the result of the election.*"

State vs. Winkelmeier, 35 Mo. 103. Decided 1864.
Bassett vs. St. Joseph, 37 Mo. 270. " 1866.
State vs. Binder, 38 Mo. 456. " 1866.

So too, the Constitution of 1865, and the Statute passed thereunder, governing subscriptions to Railroad companies and requiring, "*two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, to assent thereto,*" had received a like construction by the Supreme Court, and by the Legislature of Missouri.

State vs. Linn County, 44 Mo. 504. Decided Oct. 1869
Township Aid Act. Approved March 23, 1868.

No other rule ever prevailed in Missouri until after the decision of this Court in the case of *Harshman vs. Bates County*, 92 U. S. 569, at the October Term 1875, and not then, until the April Term 1878, when the Supreme Court of Missouri in the cases of *State vs. Brassfield*, 67 Mo. 331. *Webb vs. La Fayette County*, *id.*, 353, *Ranney vs. Bader*, *id.*, 476, all decided at the same term, taking its cue from the *Harshman* case, for the first time, asserted a different rule of construction for the constitutional and statutory provisions under consideration.

In the case of *State vs. Brassfield*, the opinion was delivered by Justice Henry and concurred in by Sherwood; Justice Hough delivered a separate opinion, concurring in the result, but dissented from the other two, as to the method of establishing the number of qualified voters, the latter holding that neither registration lists, nor the list of voters voting at

the election was *conclusive* but that the number of voters might be proved by evidence *aliunde*.

JUSTICE NAPTON dissented and concurred in the opinion of Chief Justice Waite in the case of *Cass County vs. Johnston* 95 U. S. 360.

JUSTICE NORTON having been of counsel did not sit. In the case of *Webb vs. LaFayette* county, Norton delivered the opinion of the court affirming the judgment, which was concurred in by *Sherwood* and *Henry*, Judges *Napton* and *Hough* dissented, the former of whom, delivered a dissenting opinion, ably sustaining the views of the plaintiff in error in the pending case.

The case of *Ramsey vs. Bader*, was also decided by a divided court Napton and Hough dissenting.

Under the settled construction of the law at the time of the making of this contract of subscription, the county court by virtue of the proceedings then had, had the lawful power to subscribe to the capital stock of the relator company.

In the exercise of a valid power then existing, it did subscribe to its capital stock, and after the latter had expended millions of dollars in carrying out and completing the contract thus made, the Supreme Court of Missouri changed its previous rule of construction so as to render the former valid subscription invalid and void.

This cannot be permitted. The settled judicial construction given to the laws of Missouri in the cases first cited, so far as this contract of subscription is concerned, is as much a part of the law as the text itself and the subsequent change of decision is the same in effect as a repeal or an amendment by legislative enactment, and cannot be permitted to impeach and

impair the validity of the contract of subscription sought to be enforced in this proceeding.

Douglas vs Pike County, 101 U. S. 677.
Anderson vs Township of Santa Anna, 116 U. S. 356.

II.

The court below erroneously permitted the respondent to read in evidence, against the objections of relator, the registration books used at the general election of 1868, and the subsequent special elections held in the year 1869, and 1870, and the Supreme Court of Missouri in that regard erred in affirming the said judgment.

III.

A proper construction of section 14, of article XI. of the Constitution of Missouri of 1865, authorizing counties, cities, and towns to become stockholders in and to loan their credit to Railroad and other companies and associations is that, two-thirds of the qualified voters of such county, city, or town, *who may vote at a general or special election* called for the purpose of determining the sense of the voters thereof shall assent thereto.

Wherefore the judgment of the Court below, herein affirmed by the Supreme Court of Missouri, construing the aforesaid constitutional provision, so as to require the affirmative vote of two-thirds of the entire number of persons appearing upon the registration lists as qualified voters, whether voting or not, is erroneous in that, such judgment impeaches, impairs and invalidates the contract of subscription between the county and the relator company, and therein is in violation of, and contrary to the provisions of section 10, of article I. of the Constitution of the United States, and violative of the relator's rights thereunder.

Inasmuch as the second and third assignments of error, practically cover the same point, they will be considered together.

On the trial of the case, when the defendant in error, offered in evidence the registration books for the purpose of showing that there were a larger number of persons registered than those voting at the election, the plaintiff in error, among other objections (which are set out in full in the statement of the case) objected.

5. "Because the best evidence of the number of qualified in said county at the time of the making of such subscription, is found in the whole number of votes cast at the special election so held to ascertain the sense of the voters.

6. Because although such registration books might show a larger number of persons registered during the general registration of 1868, and subsequent special registrations Sept. 2, 1869, and Feb'y 17, 1870, than voted at such special election, yet it would not be any evidence that such persons whose names were so found on such registry lists were qualified voters at the time of the election unless they actually voted.

9. Because at the time of the making of the contract of subscription, between the county and the relator company, it was a settled rule of judicial construction with legislative sanction, that all those who did not see fit to vote, if any, acquiesced in the action of those who did vote, and are bound and concluded by the result of the election.

11. Because the effect of their admission in evidence, is in a collateral way, to impeach and impair the validity of the contract of subscription, in contravention to section 10, of article I. of the Constitution of the United States.

These with other objections were overruled by the court, and the registration books admitted in evidence, the plaintiff in error excepting.

After these registration books had been admitted as proper evidence, and after the respondent had begun to read therefrom, and before the reading had been finished, the plaintiff in error in order to save the time to be necessarily consumed in the reading of these registration books, some 13 in number, conceded, that counting all the names put upon such books at the general registrations of 1868, the subsequent special registrations of Sept. 2, 1869, and Feb'y 17, 1870, such books showed the names of 1940 persons registered as qualified to vote.

It was not conceded nor intended to be conceded that there were 1940 qualified voters in the county at the time of the holding of the special railroad election.

On the contrary it was only conceded that these books showed 1940 registered voters, and that only, was conceded for the purpose of shortening the trial.

At the same time the defendant in error conceded that the highest number of votes polled at the general election in November 1868 was 1496.

And that the highest number of votes polled at the general election in November 1870, was 1508.

The total number of votes polled at the special railroad election Feb'y 22, 1870 was 1049 for, and 257 against the subscription, or a total of 1306.

A comparison of the returns, of these several elections, shows that the number of votes cast in favor of the subscription, was not only more than two-thirds of the votes cast at the special railroad election, but that such vote was more than

two-thirds of the entire vote polled at the previous general election in 1868, and more than two-thirds of the entire vote polled at the general election thereafter in November, 1870.

This illustration of the number of votes cast at these several elections is a strong argument in favor of the proposition that such registration books are not the best evidence of the number of qualified voters in the county as held by the trial court, and affirmed by the Supreme Court of Missouri in the pending case.

And with equal force and pregnance it supports the rule first enunciated by the Supreme Court of Missouri, and sustained by this Court, that the number of votes cast, must determine the number of qualified voters in cases of this character.

"*The controlling question arising on this record, is as to the propriety of the action of the trial court in admitting in evidence the said registration books.*"

Such was the expression of Justice Norton in delivering the opinion of the Supreme Court of Missouri in the case at bar.

And such it is. The objections to their admission of these books in evidence was urged with force and at great length in the trial court.

The objections being overruled, a like view of the law was presented in the instructions asked by the plaintiff in error and refused by the Court.

The judgment of the trial court was given against the plaintiff in error solely upon the registration books thus admitted in evidence.

And this error was urged upon the trial court in the respective motions for a new trial and in arrest of judgment.

This too, was the sole ground of error assigned, urged and decided in the Supreme Court of Missouri.

No other question arises, or can arise on this record, and the contention of the plaintiff in error is, that two-thirds of the qualified voters, as used in the Constitution and Laws of Missouri in force at the time of the making of the contract in question, does not mean two-thirds of those qualified and entitled to vote, but only two-thirds of those qualified and actually voting, to be determined from the official return of the result.

It can make no difference how many persons were registered as qualified to vote in said county at the time of such election, for all qualified voters therein who absented themselves therefrom are presumed to have assented to the expressed will of the majority of those voting.

Hence the registration books should have been excluded, and, the contract of subscription upheld.

Wherefore the judgment of the Supreme Court of Missouri affirming the judgment of the trial court should be reversed.

State vs. Winkelmeier, 35 Mo. 103. (1864)
Bassett vs. St. Joseph, 37 Mo. 270. (1866)
State vs. Binder, 38 Mo. 456. (1866)
State vs. Linn County, 44 Mo. 504. (1869)
Township Aid Act, Approved March 23, 1868.
St. Joseph Township vs. Rogers, 16 Wall. U. S. 664.
County of Cass vs. Johnston, 95 U. S. 360.

The Township Aid Acts provided that, "if it shall appear, from the returns of such election, that not less than two-thirds of the qualified voters of such township, *voting at such election* are in favor of such subscription it shall be the duty of the County Court to make such subscription, &c."

In the case of the *County of Cass vs. Johnston, supra*, Chief Justice Waite reviewed all of the Missouri decisions herein cited, as well as many other analogous cases, and after doing so, in delivering the opinion of the Court held, that the language of the Township Aid Act was synonymous to that used in the Constitution of 1865, relating to the same subject.

If this be a sound construction of that act, the contention of the relator is equally well grounded.

It contends for no more and should be entitled to no less.

It was further held in that case, to be the settled rule of law in Missouri, "that all qualified voters who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting," unless the law providing for the election otherwise declares.

There is not now, nor has there ever been a law of Missouri expressive of the legislative intent to the contrary, so as to bring the above rule within the exception noted.

III.

Whatever doubts may have existed as to the correctness of the foregoing propositions at the time of the trial of this case in the Court below, they are set at rest in the case of

Carroll County vs. Smith, 111 U. S. 556.

This was a case arising under the Constitution and Laws of Mississippi.

Article 12, section 14 of the Constitution of Mississippi, like that of Missouri declares that—

"The Legislature shall not authorize any county, city or town to become a stockholder in, or lend its credit to any company, association or corporation, unless *two-thirds of the qualified voters of such county, city or town, at a special election, or regular election to be held therein, shall assent thereto.*"

In Mississippi as in Missouri there was a constitutional provision requiring a registration of all qualified voters.

In that case, it was conceded, that there were from 2,000 to 2,500 qualified voters in Carroll County Mississippi at the date of the election, and that the proposition submitted did not have two-thirds of either number, while the concession in this case was, that the registration lists showed 1940 persons as qualified to vote.

That case, in all its bearings, and in all its particulars is exactly and squarely in point, in this case and no better argument can be adduced in support of the contention of the plaintiff in error than the opinion of the court in that case.

Mr. Justice Matthews, speaking for the court says:

"It is claimed, on behalf of the plaintiff in error, that the qualified voters referred to in the constitution of Mississippi and the charter of the railroad company, are those who have been determined by the registrars to have the requisite qualifications of electors, and who have been enrolled by them as such, and that it requires a vote of two-thirds of the whole number enrolled as qualified to vote, and not merely two-thirds of such actually voting at an election for that purpose, to authorize the issue of such bonds in suit.

That presents the single question for our decision, &c.

* * * * We have considered the reasoning of the Supreme Court of Mississippi, in its opinion in the case of *Hawkins vs. Carroll County*, with the respect which is due to the highest judicial tribunal of a state speaking upon a topic as to which it is presumed to have peculiar fitness for correct decision, and, while we are bound to admit the carefulness and fulness of its examination of the question, we are not able to' follow its conclusions.

On the contrary we are constrained to follow the decision in *St. Joseph Township vs. Rogers*, 16 Wall. 644, and adhere to the views expressed by this Court in *County of Cass vs. Johnston*, 95 U. S. 360, in deciding the same question upon the construction of a provision of the Constitution of Missouri, which is identical with that of the Constitution of Mississippi under consideration. It was there declared and decided, that "all qualified voters, who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed," page 369. In Missouri, as in Mississippi, there was a constitutional provision requiring a registration of all qualified voters. *State vs. Sutterfield*, 54 Mo. 391.

Much stress was laid by the Supreme Court of Mississippi upon the registration record, as furnishing the standard by which to ascertain the proportion of qualified voters, whose assent was required by the Constitution.

On this point, they say, 50 Miss. 761, "There exists, therefore, in each county a registration of the list of voters, which ought to show, with approximate accuracy, the names of those entitled to vote, at any election. In ascertaining,

therefore, the result of an election requiring two-thirds of the qualified voters of the county to assent thereto, we think that the registration books are competent evidence on the point of the number of qualified voters in the county.

It would be open to proofs to show deaths, removals, subsequently incurred disqualifications, &c.

When the Constitution uses the term qualified electors, it means those who have been determined by the registrars as having the requisite qualifications by enrolling their names, &c. It would be a fair construction of the 14th section to hold that the 'two-thirds' meant that number of the whole number whose names had been enrolled as legal voters. That furnished the official evidence of those *prima facie* entitled to vote.

But, in this case, in addition to the information contained in the registration books, it is admitted that there were from 2,000 to 2,500 qualified voters in Carroll county at the date of this election. The proposition submitted did not have the assent of two-thirds, as required by the Constitution. The difficulty of proving the number of voters in the county has been obviated by this admission."

After thus quoting from the opinion of the Supreme Court of Mississippi, the opinion of this Court is as follows:

"But this reasoning, as it seems to us, does not meet much less overcome, the difficulty of the argument.

The constitution of Mississippi, although it does not recognize any voters as qualified, except such as are registered, does not make all persons, registered as such qualified. And yet, if it is to be construed, in the clause in question, as referring to the registration as conclusive of the number of qualified voters, then no proof is competent to purge the list of those

who never were qualified, or have died, removed, or become otherwise disqualified, thus obliterating the distinction between registered and qualified voters; and if, on the other hand, it is to be construed as meaning voters qualified, in fact and in law, without reference to the sole circumstance of registration, then the body of the electors is as indefinite as though there were no registration, and the determination of the whole number, if an actual enumeration of the whold number is required to determine how many are two-thirds thereof, is completely a matter *in pais*, and must be inquired of and ascertained, in each case, by witnesses.

The difficulty, if not the impossibility, of reaching results by such methods, amounts almost to demonstration, that such could not have been the legislative intent, or the meaning of the constitution. The number and qualification of voters at such an election, is determinable by its results, as canvassed, ascertained and declared by the officers appointed to that duty, or as subsequently corrected by a contest or scrutiny in a direct proceeding, authorized and instituted for that purpose; it cannot be contested in any collateral proceeding, either by inquiry as to the truth of the return, or by proof of votes not cast, to be counted as cast against the proposition, unless the law clearly so requires.

In our opinion the constitution of Mississippi did not mean, in the clause under consideration, to introduce any new rule. The assent of two-thirds of the qualified voters of the county, at an election lawfully held for that purpose, to a proposed issue of municipal bonds, intended by that instrument, meant the vote of two-thirds of the qualified voters present and voting at such election in its favor, as determined by the official return of the result. The words "qualified voters," as used in the constitution, must be taken to mean not those

qualified and entitled to vote, but those qualified and actually voting.

In that connection a voter is one who votes, not one who, although qualified to vote, does not vote."

The decision in the foregoing case is conclusive of the case at bar.

As the decision of the Supreme Court of Mississippi in the case of *Hawkins vs. Carroll County*, was disregarded in the opinion cited, so should this Court disregard the case of *State vs. Brassfield*, 67 Mo. 331. *Webb vs. La Fayette County*, 67 Mo. 353. *Ranney vs. Bader*, 67 Mo. 476, and other kindred cases, decided by the Supreme Court of Missouri, long years after the making of this contract of subscription by a dissentient Court.

This contract was lawfully made between the relator company and the county, in the year 1870, under a settled rule of construction maintained by the authorities cited under the first proposition of this brief.

In good faith, by the evidence proven, the relator company relying upon this subscription, expended millions of dollars, in carrying it out.

In 1878, the Supreme Court of Missouri changed its ruling in relation to the method of proving who are "qualified voters," and *ipso facto* the previous valid contract between the relator company and the county is to be repudiated and for naught held.

The contract having been lawfully made between the county and the relator company, and in good faith performed by the latter, the judgment of the trial court, affirmed by the Supreme Court of Missouri, impairs the validity thereof, in

violation of section 10, of Art. I., of the Constitution of the United States.

Douglass vs. Pike County, 101 U. S. 677.
Anderson vs. Township of Santa Anna, 116 U. S. 356.
St. Joseph Township vs. Rogers, 16 Wall, 664.
County of Cass vs. Johnston, 95 U. S. 360.
Carroll County vs. Smith, 111 U. S. 563–5.

Under the authorities cited and for the reasons given the judgment of the Supreme Court of Missouri, affirming the judgment of the Sullivan County Circuit Court should be *reversed*.

JNO. P. BUTLER,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
MAR 28 1892
JAMES H. McKENNEY,
CLERK.

No. 256.

—IN THE—

SUPREME COURT Of The UNITED STATES,

OCTOBER TERM, 1891.

THE STATE OF MISSOURI AT THE RELATION AND TO THE USE OF THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, Plaintiff in Error,

AGAINST

ANDERSON W. HARRIS, GEORGE T. TODD AND THOMAS MONTGOMERY, JUDGES OF THE COUNTY COURT OF SULLIVAN COUNTY, MISSOURI, Defendants in Error.

ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT OF THE CASE, AND BRIEF FOR DEFENDANTS IN ERROR.

D. M. WILSON,
A. W. MULLINS,
Attorneys for Defendants in Error.

"NEWS" JOB PRINT, LINNEUS, MO.

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ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT OF THE CASE ON BEHALF OF DEFENDANTS IN ERROR.

THE relator, the Quincy, Missouri and Pacific Railroad Company, filed its petition in the Circuit Court of Sullivan county, Missouri, praying that an alternative writ of mandamus issue against the respondents, the defendants in error herein, to compel them to issue and

deliver to the relator $80,000 in the bonds of said county to be in payment for so much stock alleged to have been theretofore subscribed for by said Sullivan county. The alternative writ asked for was issued on April 7, 1881, and made returnable on Monday, November 21, 1881, and was served on September 16, 1881.

An amended alternative writ in said cause was issued at the May term, May 15, 1882, of said court, which was made returnable on the day of its issue.

In this writ it was alleged that the County Court of said Sullivan county on December 22, 1869, "did order an election to be held at the usual and various voting places in said county as then established by law, on the 22nd day of February, 1870, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan would assent to a subscription in the sum of $200,000 to the capital stock of the relator, subject to the following conditions—that is to say, said railroad to be located and constructed through said Sullivan county from East to West on a line as near through the center of said county as practicable, said subscription to be paid to said company, the relator, in the bonds of said county at par, said bonds to bear interest at the rate of seven per cent. per annum, interest payable annually, to bear date the day of their issue, and to become due and payable 20 years after the date thereof, * * * . That whenever the relator, the said railroad company, should have *surveyed and permanently located* said road *continuously* through the State of Missouri from West Quincy, in Marion county, in said State, to some point on the Missouri river opposite or near Brownsville,

in the State of Nebraska, and should have continuously graded, bridged and tied six miles of said railroad within Sullivan county aforesaid, * * then the said county of Sullivan, by its County Court aforesaid, would issue and deliver to the relator * * its bonds in the payment of such subscription to the amount of $40,000, and for each additional section of six miles so continuously graded, bridged and tied within said county of Sullivan said county would issue and deliver to the said relator an additional sum of $40,000 in bonds of said county as aforesaid * * . That in pursuance of law then in force a special registration of the qualified voters of said county, who had become such since the last general registration and subsequent special registrations of the qualified voters of said county prior thereto, was had and held in the various municipal townships in said county prior to the holding of such special election;" and that said election was duly held on the day designated, and which resulted in a vote, as canvassed and declared by the County Court on February 23, 1870, of 1049 votes for the subscription and 257 votes against it, and the County Court thereupon declared, and entered an order of record accordingly, that said proposition had carried and ordered the President and Clerk of said Court to enter the subscription on the stock book of the railroad company. That this was done on April 5, 1871. That the relator filed its articles of association in the office of the Secretary of State of said State of Missouri on June 29, 1869, when it became incorporated, and that before June 29, 1879, it had *surveyed and per-*

manently located its said railroad *continuously* through the State of Missouri from West Quincy, in Marion county, in said State, to a point on the Missouri river, in Atchison county, Missouri, opposite the city of Brownsville, in the State of Nebraska. That on and prior to June 29, 1879, the relator had constructed and was operating its line of railroad from West Quincy to a point 16 miles West of Kirksville, Adair county, Missouri, and from there had constructed its road-bed, bridges and superstructure to the Eastern boundary line of Sullivan and from said point, prior to said last named date, had continuously graded, bridged and tied two sections of six miles each—in all 12 miles—within the limits of said Sullivan county. That thereafter in said year 1879, the relator tendered certificates of stock to the amount of $80,000 and demanded bonds of the county in such amount in payment of said subscription, and that said county and the Judges of the County Court declined and refused to accept the stock or issue the bonds. (Printed Rec. pp. 6–11.)

The respondents made their return and answer to said alternative writ, admitting that they were the justices of the County Court of said Sullivan county, but putting in issue by general and specific denials all the other allegations therein contained. (Printed Rec. pp. 11–13.)

The case was tried in said Sullivan county Circuit Court on November 27, 1882, and the record discloses that it was shown by the evidence that the relator, the Quincy, Missouri and Pacific Railroad Company, was incorporated under the general laws of the State of Mis-

souri as a railroad company, June 29, 1869, for the purpose of constructing and operating a railroad from West Quincy, on the Mississippi river, in Marion county, Missouri, to a point on the Missouri river, in Atchison county, Missouri, opposite the City of Brownsville, Nebraska. And that on December 22, 1869, the County Court of said Sullivan county made an order that an election be held at the usual voting places in said county, on the 22nd day of February, 1870, for the purpose of ascertaining whether two-thirds of the qualified voters of said Sullivan county would assent to a subscription of $200,000 to the capital stock of said company, subject, however, amongst others, to the following conditions: "Said railroad to be located and constructed through said Sullivan county from East to West, on a line as near through the center of said county as practicable; said subscription to be paid to said company * * * in the bonds of said county at par, * * * ; and that whenever said company shall have *surveyed and permanently located* said railroad *continuously through said State of Missouri* from West Quincy, in Marion county, in said state, to some point on the Missouri river opposite or near Brownsville, in Nebraska, and shall have continuously graded, bridged and tied six miles of said railroad within Sullivan county aforesaid upon the line hereinbefore designated, then the County Court of said Sullivan county shall issue and deliver to said railroad company the bonds of said Sullivan county to the amount of forty thousand dollars, and for each additional section of six miles so continuously graded, bridged and tied within said county of Sullivan said County Court shall

issue and deliver to said company an additional sum of forty thousand dollars in the bonds of said county as aforesaid until the whole subscription aforesaid shall have been paid up." (Printed Rec. pp 21–22.)

At the election held February 22, 1870, according to the official canvass of the votes, there were 1049 voters in favor of the proposed subscription and 257 against it, and the County Court made an order declaring the result and that the proposition had carried.

With respect to the location of the line of the railroad *E. M. Collins*, chief engineer of the relator company testified: "My occupation is civil engineering. * * As such civil engineer I located the line of said railroad from Novinger to Green Castle in the spring of 1878, and continued the location thereof to the city of Milan. During the summer of that year, on the same general line on which the same is now being operated, there were more than twelve miles of said road within said county graded, bridged and tied prior to the 29th day of June, 1879.

The distance between Novinger and Green Castle is about twelve miles. In 1870–1 we made some preliminination surveys in a Northwest direction from Milan, which preliminary surveys ran a mile or two South of the town of Wintersville, *but we never made any permanent location there.*"

Said witness, *Collins*, recalled, testified: "*The first permanent survey in which the line was finally established West of Milan was made in* 1880; made several preliminary surveys prior to that time." (Printed Rec. pp. 25, 30.)

With respect to the completion of the *grading, bridging and tieing* of said twelve miles of the railroad in said Sullivan county, the evidence is thus stated in the record: "Relator then produced *Addison Payne*, *E. L. Fish*, *M. Hare* and *J. M. Campbell*, who, being sworn on the part of relator, gave evidence tending to prove relator's compliance with the contract of subscription as to the first 12 miles within said county." * * * *

"Thereupon the defendants produced *Joshua Gray*, *Thomas McCallister*, *A. W. Harris*, *O. P. Phillips*, *E. E. Prindle*, *Buck Mason*, *Sumner Boynton* and *S. M. Grigsby*, who, being sworn, gave evidence tending to prove that the relator had not complied with the contract of subscription." (Printed Rec. pp. 25, 27.)

The fourth section of article two of the Constitution of Missouri, of 1865, provided that "The General Assembly shall immediately provide, by law, for a complete and uniform registration, by election districts, of the names of qualified voters of this State; which registration shall be evidence of the qualification of all registered voters to vote at any election thereafter held; * * and the fact of such registration shall be no otherwise shown, than by the register, or an authentic copy thereof, * * A new registration shall be made within sixty days next preceding the tenth day prior to every biennial general election;" * * .

In pursuance of this constitutional mandate the Legislature of Missouri passed a registration act, which was approved December 16, 1865, and a supplemental act was passed and approved, March 12, 1866, and a revised act was passed and approved, March 21, 1868.

The act of 1868 contained the following provisions:

Said act provided for the appointment by the Governor, by and with the advice and consent of the Senate, in each Senatorial District of the State, a Superintendent of Registration. (Section 1.) And said Superintendent was required to appoint three persons in each county of his district, who were qualified voters of such county, sa a Board of Registration thereof. (Section 2.) The Board of Registration was required to make a full, true and complete registration of the qualified voters of the county, and of each election district thereof, before each general election, "commencing not more than seventy days before the day of election * * *, and ending on or before the eighteenth day next preceding such election." (Section 7.) "On the six secular days next preceding the tenth day before each general election the Supervisor of Registration of each county, [an elective officer] in connection with the Board of Registration of such county, shall meet at the county seat in each county as a Board of Review, * * *. The Board shall pass upon the claims of all persons who have been unable to appear before the Board of Registration of their respective districts, upon the claims of persons who consider that injustice has been done them by the Board of Registration refusing to record them as qualified voters, and also on objections made to persons who have been registered as voters." (Section 11.) "Immediately after the closing of said Board of Review, the Board of Registration shall make out and certify two fair copies for each election district, in their respective counties, alphabetically arranged, of the names of the qualified voters as

ascertained and determined by said Board of Review, one of which copies for each election district they shall deposit with the Clerk of the County Court on or before the Saturday next preceding the election, and the other, for each election district, they shall deliver forthwith to some one of the persons who shall have been appointed to act as judge of the next ensuing general election in the election district for which the list was made," * * . (Section 12.) "The Board of Registration shall, as soon as may be, deposit with said Clerk the original books of registration, which shall be kept and preserved among the records of the Court," * * . (Section 14.) "The Board of Registration shall, during their session in each election district in their respective counties, appoint three qualified voters as judges of election for such election district," * * . (Section 15.) "For the purpose of keeping the list of qualified voters complete, the Clerk of the County Court shall, twenty days before any special election * * , cause to be delivered to the Board of Registration, or any member thereof, the books of registration returned by said Board of Registration, who shall immediately proceed to register the names of such persons as have become qualified voters after the closing of the registry, and also such persons as may be entitled to registration, but who, for any good and sufficient cause, failed to present themselves for registration at the last general registration. Said Board shall, whenever an election is to be held in any election district within their county before the next general election, certify to the judges of election the additional names registered by said Board, along with the general list made

out at the preceding general registry. Said Board shall complete said books of registration five days prior to said special election." Section 18. (Session Acts of Mo., of 1868, pp. 131–141.)

The defendants on the trial offered in evidence the registration books of Sullivan county made in 1868 for the general election of that year and for a special election in 1869 and the special election held February 22, 1870, which books were identified by James Morris, Clerk of the County Court of that county; and in that connection *F. E. Stone*, one of the registration officers, testified as follows: "I have recently examined the registration books identified by Mr. Morris. They are books used for the general election in 1868 and at the special elections in 1869 and 1870. They were prepared and arranged for use by *W. B. Taylor, W. H. Custer and myself*. The thirteen books now shown me are the books that were used at the special election held Feb'y 22, 1870. *Mr. Custer* made certified copies of special registration of voters for the use of the judges of election as soon as such registration was completed.

Myself, Taylor and Custer composed the Board of Registration, and they held a special registration prior to and for the special railroad election held on the 22 day of Feb., 1870, and appointed the judges for such election." (Printed Rec. p. 27.)

The defendants then offered said registration books in evidence, to which the relator objected for many reasons assigned. (Printed Rec. pp. 28–30.) The Court overruled the objections and admitted said books in evidence. The counsel for relator then conceded that said

registration books contained the names of 1940 persons qualified to vote in said county at said election held February 22, 1870. (Printed Rec. p. 30.)

The Court found for the defendants and dismissed the writ, finding "that two-thirds of the qualified voters of said county did not vote in favor of such subscription, and that by reason thereof there was a want of a valid power existing in the County Court of said county to make the contract of subscription in question."

The relator sued out of the Supreme Court of Missouri a writ of error in said cause, on November 12, 1885, (fifteen days before the expiration of the time limited therefor under the law of that State,) and thereafter prosecuted the case on said writ in said Supreme Court where judgment was rendered on June 18, 1888, affirming the judgment of the trial court.

The opinion of the Supreme Court of Missouri, delivered by Chief Justice Norton, placed its affirmance of the judgment of the Circuit Court on the ground that the County Court of Sullivan county had no power or authority conferred upon it, and possessed none under the Constitution and laws of the State, to make the subscription, and that its acts in that regard were unauthorized and void. "Besides this," the Court said, "while there was evidence tending to show that the railroad company has complied with the conditions of the subscription, there was also evidence to show that it had not complied, and the trial court might on this ground have well denied the relief asked." (Printed Rec., pp. 81–84.)

BRIEF.

I.

There is no Federal question involved in this case; and therefore this Court is without jurisdiction and the writ of error should be dismissed.

The subscription for the stock in the railroad company to be valid, so as to entitle the company to the bonds in payment therefor, could be made only in the event that the proper authority was first conferred upon the County Court, under and in pursuance of the Constitution of the State and the laws thereof then in force. The Constitution of Missouri, of 1865, provided that "The General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election, to be held therein shall assent thereto." (Art. 11, § 14.) And the Statute of Missouri, enacted in pursuance of said constitutional

mandate, with respect to railroad companies, provided that "It shall be lawful for the County Court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city or town, or loan the credit thereof to any railroad company duly organized under this or any other law of the state: *provided*, that two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein shall assent to such subscription." (Chap. 63, § 17, R. S. of Mo., of 1865, p. 338.) The election to express such assent had to be held in accordance with the requirements of the Constitution of the State and the laws thereof providing for the registration of voters. Whether such assent was in fact given became one of the questions for decision in this case by the Circuit Court of said Sullivan county. The Court in that regard decided that it had not been given. And that judgment was affirmed by the Supreme Court of the State. Thus it was that the power to contract rested alone on the authority of the State Constitution and the State laws, and the question having been submitted by relator to the State Court for decision and the highest Court of the State having decided against relator, that decision is final.

The counsel for relator predicates his contention that there is a Federal question involved in this case on the ground, as we understand him, that the provision of Article I, section 10, of the Constitution of the United States, declaring that "No State shall * * pass any bill * * or law impairing the obligation of contracts," * * has been violated; and yet it is not pointed out or

claimed by him that the State has passed any law relating to or in anywise affecting the subject matter in question subsequent to the making of said alleged contract, but his complaint is based solely on his dissatisfaction with the judgment of the trial court, affirmed by the Supreme Court of the State.

"When the State Court decides against a right claimed under a contract, and there was no law subsequent to the contract, this Court clearly has no jurisdiction."

N. O. Waterworks vs. La. Sugar Co., 125 U. S. 18, 38;

Henderson Bridge Co. vs. Henderson City, 141 U. S. 679;

De Saussure vs. Gaillard, 127 U. S. 216;

Murdock vs. City of Memphis, 20 Wall. 590;

Chouteau vs. Gibson, 111 U. S. 200;

Citizens' Bank vs. Board of Liquidation, 98 U. S. 140;

Adams County vs. B. & M. Railroad Co., 112 U. S. 123, 127;

Knox vs. Exchange Bank, 12 Wall. 379, 383;

Railroad Company vs. Rock, 4 Wall, 177;

Worthy vs. The Commissioners, 9 Wall. 611;

Railroad Company vs. McClure, 10 Wall. 511;

McBride vs. Hoey, 11 Pet. 167;

Brown vs. Atwell, Adm'r, 92 U. S. 327;

Section 709, U. S. Revised Statutes.

Even if the relator's counsel be correct in his contention that the decision and judgment of the Supreme Court of Missouri is erroneous—which we deny—and

that this Court has otherwise held in a line of recent decisions, still that does not present a Federal question so as to confer jurisdiction upon this Court in the case.

The case of Citizens' Bank vs. Board of Liquidation, *supra*, was an application for mandamus to compel the Funding Board of Louisiana to fund, under a law of that State, $60,000 of bonds guaranteed by the State. The board had refused to fund these bonds. The averment in the petition was "that the refusal of the board to fund the bonds and coupons presented by the petitioners is in violation of the compact entered into between the people of the State of Louisiana and the bondholders." Amongst other defenses set up the defendants alleged "that the bonds presented in this case, * * are not included among the obligations permitted to be funded by the act, * * and are not the bonds of the State." The defense was sustained by the Supreme Court of the State. This Court held that no Federal question was involved and that this Court had no control. The Chief Justice, speaking for the Court, said: "In fact, being the construction of a State Statute by a State Court, it controls us. Under these circumstances, if we should take jurisdiction we would be compelled to affirm the judgment, whether we found any error in respect to questions arising under the other defenses or not. * * As the State Court has decided as a question of State law that even if the guaranties of the bond are valid obligations of the State, they are not fundable under the act, it matters not in this suit whether the decision against their validity was erroneous or not." (98 U. S. 140–142.)

In the case of Brown vs. Atwell, administrator, *supra*, in the opinion delivered by the Chief Justice, it was said: "We have often decided that it is not enough to give us jurisdiction over the judgments of the State Courts for the record to show that a Federal question was argued or presented to that Court for decision. It must appear that its decision was necessary to the determination of the cause," * * . (92 U. S. p. 329.)

Mr. Justice Miller, in delivering the opinion of this Court in the case of Railroad Company vs. Rock, *supra*, said: "In the argument of counsel before us, no attempt is made to show that any provision of the Constitution of the State of Iowa conflicts in any way with the Constitution of the United States. The whole case, in the language of the brief, is put upon the ground that the 'Supreme Court of Iowa has made a decision in this case which impairs the obligation of contracts'; and the argument goes upon the fundemental error that this Court can, as an appellate tribunal, reverse the decision of a State Court, because that Court may hold a contract to be void which this Court might hold to be valid. If this were the law, every case of a contract held by the State Court not to be binding, for any cause whatever, can be brought here for review, and we should thus become the Court of final resort in all cases of contract, where the decisions of State Courts were against the validity of the contracts set up in those Courts. This, obviously, was not the purpose of the Judiciary Act It must be the Constitution, or some law of the State, which impairs the obligation of the contract," * * . (4 Wall. 181.)

And in the case of Knox vs. Exchange Bank, *supra*, this Court said: "We are not authorized by the Judiciary Act to review the judgments of the State Courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State Court could be brought here, when the party setting up a contract alleged that the Court had taken a different view of its obligation to that which he held. As this Court said in *Railroad Company vs. Rock*, it must be the Constitution, or Statute, of the State which impairs the obligation of a contract, or the case does not come within our jurisdiction." (12 Wall. 383.)

II.

Waiving for the present the question of jurisdiction, which we think decisive of the case, let us now turn to the reasons assigned by the relator why the judgment should be reversed.

Relator's contention, as we understand it, is based upon two propositions:

1. That the phrase "two-thirds of the qualified voters" as used in the Constitution and laws of Missouri in force on the 5th day of April, 1871—the date of the entering of the county's subscription on the company's books—had by an unbroken line of decisions of the

highest Court in the State, been construed to mean "two-thirds of those qualified and actually voting."

2. That more than two-thirds of those qualified and voting on the proposition having voted in favor of the subscription and the company having in good faith fully performed its part of the contract while the law was so construed, the rights of relator became vested and could not be affected by any subsequent decisions of the same Court announcing a different doctrine or rule of construction.

This whole matter in our judgment turns upon the correct answer to the question when under the contract of subscription, did the company's right to the bonds become vested, if at all? and this fortunately can be readily determined by an examination of the record.

The contract of subscription was subject to the following express conditions:

1. The proposed railroad was to be located and constructed through the county from East to West on a line as near through the center of the county as practicable.

2. The proposed railroad was to be *surveyed and permanently located continuously through the State from West Quincy*, in Marion county, *to some point on the Missouri river opposite or near Brownsville, Nebraska.*

3. The company was to continuously grade, bridge and tie six miles of railroad within the county on the designated line.

Upon the faithful performance of these conditions the County Court was to issue and deliver to relator the bonds of the county to the amount of $40,000, and

for each additional section of six miles so continuously graded, bridged and tied, an additional sum of $40,000 in bonds. (Printed Record pp. 21, *et seq.*)

Evidently the relator's right to the bonds could not become vested even if the subscription had been authorized until these conditions had been performed. When were they performed? And were they performed at all?

(1.) In Dec. 1877 the railroad was located from Kirksville (Adair Co.) to Novinger (Adair Co.). The line of said railroad from Novinger (Adair Co.) to Green Castle (Sulllivan county, 2 miles West of the East line of the county) was located in the spring of 1878, and during the summer of 1878 the line was located from Green Castle (Sullivan Co.) to Milan, (Sullivan Co.,) the county seat. (Testimony of E. M. Collins, Printed Rec. p. 25.) And the first permanent survey in which the line was finally established West of Milan was made in 1880. (Testimony of Collins, Printed Rec. p. 30.)

It therefore appears that only 2 miles of road had been located in the county before the summer of 1878; that some time during that summer the road was located as far as Milan, the geographical center of the county, (See Printed Rec. p. 21,) but that the road was not even located, to say nothing of being constructed, West of Milan till 1880.

(2.) As a matter of fact the proposed railroad never has been surveyed and permanently located continuously through the State from the Mississippi to the Missouri river. It has never been surveyed or permanently located any further West than Trenton, Mo., which is only thirty-five miles Southwest of Milan, and

over one hundred and ten miles distant from Brownsville, Neb. Although it is true that the Board of Directors at a meeting held at Quincy, Illinois, by a resolution located the road *on paper* from West Quincy to a point opposite Brownsville, and even this was not done until the 7th of June, 1879. (Printed Rec. pp. 23–24.)

(3.) As to the performance of the third condition there was conflicting testimony. The evidence of four witnesses sworn on behalf of relator tended to prove that the first twelve miles of road had been graded, bridged and tied by the 29th of June, 1879, (Printed Rec. p. 25.) while the evidence of six witnesses sworn on behalf of the respondents tended to prove that the relator had not complied with this condition of the contract. (Printed Rec. p. 27)

It may therefore be answered that none of the conditions upon the performance of which the rights of the relator could have become fixed, had been performed before the expiration of the year 1878. In other words if nothing had ever been done by the company more than what had been done at the beginning of the year 1879, the relator never could have successfully maintained its right to the bonds, for the simple reason that the conditions of the contract had not been fully complied with.

Now it is true as contended for by relator that this Court has always held it to be the duty of Federal Courts in all cases within their jurisdiction, depending upon local law, to administer that law, so far as it affects contracts, obligations and rights, as judicially declared by the highest Court of the State at the time the rights

under the contract accrued; and if subsequent decisions of the State Court construe the local law differently, this Court will disregard such subsequent decisions, (Taylor vs. Ypsilanti 105 U. S. 60,) yet it is equally true, as stated in the *Taylor-Ypsilanti* case, that the settled construction given by the highest Court of the State, of the laws and Constitution of that State, must be deemed, in all cases, binding upon the Federal Courts; and this because the Statute defining and regulating the jurisdiction of the Federal Courts declares that the laws of the several States, when they apply, shall constitute rules of decision in cases at common law tried in those Courts.

Now what was the settled construction of the law at the time the rights of relator to the bonds became fixed, if at all? This as we have already seen was not earlier than the year 1879, if then.

Taking it for granted that this Court is right in its contention that the Supreme Court of Missouri had decided in the *Winkelmeier* case (35 Mo. 103,) decided in 1864, in the *Bassett-St. Joseph* case (37 Mo. 270) decided in 1866, in the *Binder* case (38 Mo. 456) decided in 1866, and in the *Linn County* case (44 Mo. 504) decided in 1869, that two-thirds of the qualified voters as used in the Constitution and laws of Missouri meant only two-thirds of those qualified and actually voting—which the Supreme Court of Missouri deny—and that such was the construction of the law in this State at that time, yet the fact remains equally true that such was not the construction subsequently announced by the Supreme Court of Missouri in the cases of *State vs. Brassfield* (67 Mo.

331), *Webb vs. Lafayette Co.* (67 Mo. 353), and *Ranney vs. Bader* (67 Mo. 476), decided at the April term, 1878, the *Brassfield* case having been decided *April* 16, 1878, and that since that time the rule of decision has been directly to the contrary. (The State ex rel. vs. Walker, 85 Mo. 41, decided in 1884, and see cases there cited.)

It was therefore the settled rule of construction in this State in 1879, the year that the relator became entitled to the bonds, if at all, that in order for the County Court to have conferred upon it the power to subscribe, it must appear that two-thirds of the qualified voters of the county assented to the subscription by voting in favor of it, and that the mere inaction of such voters in failing to vote did not express such assent within the meaning of the Constitution.

It would therefore seem to follow that the doctrine evoked by the relator and relied upon by him, when applied to the facts in this case, defeats his action, and turns him out of Court.

III.

The *assent* of two-thirds of the qualified registered voters of the county *at the time of the special railroad*

election, was not given, as evidenced by the votes cast at said election. There were 1,940 voters; but only 1,049 voted for the subscription, while 257 voted against it, lacking therefore 245 votes of having the required two-thirds. Under the Constitution of Missouri and the registration laws, then in force, the voters of county at that time and on the registration books as qualified voters, could not be deprived of the right to vote. The registration was made conclusive of such right. The probative force and effect of the registration books was first considered and passed on by the Supreme Court of Missouri in the case of *The State ex rel. vs. Brassfield*, (67 Mo. 331,) *decided at the April term*, 1868, of that Court, and it was there decided that the registration books furnished the test of the number of the qualified voters, and that a qualified voter is one who by law, at an election, is entitled to vote. This decision has ever since been followed by that Court. The County Court, however, disregarded the registration law and declared the result that the proposition had carried on the ground that two-thirds of those *voting* had voted therefor.

"As County Courts," however, "are only the agents of the county, with no powers except what are granted, defined and limited by law, like all other agents they must pursue their authority and act within the scope of their powers." And as two-thirds of the qualified voters of the county did not vote for the subscription and in favor of incurring the indebtedness, the action of the County Court in undertaking to make the subscription was without authority of law, and not valid as against the county.

Walcott vs. Lawrence County, 26 Mo. 272;
Steines vs. Franklin County, 48 Mo. 167;
Saline County vs. Wilson, 61 Mo. 237;
Sturgeon vs. Hampton, 88 Mo. 203;
Ranney vs. Bader, 67 Mo. 476.

And Sullivan county was not and is not estopped by the unauthorized acts of its agent, the County Court, in making the subscription.

Jarrolt vs. City of Moberly, 103 U. S. 580;
Marsh vs. Fulton County, 10 Wall. 676;
Sturgeon vs. Hampton, 88 Mo. 203;
City of St. Louis vs. Gorman, 29 Mo. 593;
Carpenter vs. The Town of Lathrop, 51, Mo. 483.

IV.

Section 46 of Chapter 63, Revised Statutes of Missouri, of 1865, is as follows:

"If any corporation formed under this chapter shall not, within two years after its articles of association are filed and recorded in the office of the Secretary of State

begin the construction of its road, and expend thereon five per cent. on the amount of its capital, or shall not finish the road and put it in operation in ten years from the time of filing its articles of association, as aforesaid, its corporate existence and powers shall cease." (R. S. Mo., 1865, p. 343.)

This section of the Statute was amended by an act of the Legislature of Missouri, approved May 5, 1879, *having special reference to the relator company*, as follows:

"That the time within which any railroad company now organized under the general laws of this State, relating to railroads and railroad companies, shall finish its railroad and put the same in operation, shall be extended three years beyond the expiration of ten years from and after the filing of its articles of association in the office of the Secretary of State: *Provided*, that at the expiration of said ten years, such railroad company shall have finished and put in operation thirty per centum of the whole length of its proposed road; and such railroad company shall have and possess all the rights to complete, maintain and operate such road to which it would have been entitled had its road been finished and put in operation within the aforesaid ten years: *Provided*, that this act shall be operative for the purpose of the completion, maintenance and operation of such railroads only, and for no other purpose; *and that at the expiration of ten years from the time such companies were incorporated, all rights that such railroad companies might have during the period of ten years next after their incorporation to the subscription of stock in aid of the uncompleted portion of such railroads, sub-*

scribed by any individual, county, town, township or part of township in this State, or by any other association whatever, shall cease, and such subscription shall become void: Provided, that nothing in this act shall be so construed as to bind or hold any person, county, city, town or township or any part of said county, city, town or township liable to any subscription heretofore made to any railroad company, whose rights are extended, by the provisions of this act: And provided, further, that this act shall not apply to any road whose articles of incorporation shall have been filed ten years or more prior to the passage of this act, *nor shall any railroad company be entitled to the provisions of this act, until it shall have filed with the Secretary of State, an unconditional release, duly executed and acknowledged by the proper officer or officers of such company, discharging all individuals, counties, towns, cities, townships and parts of townships from all stock or aid subscribed, voted or promised in aid of the construction or maintenance of such railroad in the counties through which said company may fail to complete its road by the 29th day of June, 1879.*" (Sess. Acts, Mo., 1879, p. 170.)

If authority had been conferred upon the County Court to make the subscription—but which we claim was not the case—still under the terms and conditions of the order of the County Court upon which the vote was taken, the railroad company did not become entitled to the bonds, (1) Because it failed to *survey and permanently locate* its said road "continuously through the State of Missouri from West Quincy, in Marion county, in said State, to some point on the Missouri river opposite or near Brownsville, in Nebraska," (evidence of *E. M. Col-*

lins, relator's chief engineer, Printed Rec. pp. 25, 30,) and (2) Because of the failure of the railroad company to complete the grading, bridging and tieing of the two sections of six miles each, or either of them, in the county within the time limited by law, and (3) Because the county was released and discharged from said subscription, if it had ever been valid, by operation of law.

A full compliance with all the conditions of the order of subscription, under and in accordance with the law then in force, was an essential prerequisite to a right to the bonds.

Wagner vs. Meety, 69 Mo. 150;

State ex. rel. vs. Daviess County Court, 64 Mo. 30.

Respectfully submitted.

D. M. WILSON,

A. W. MULLINS,

Attorneys for Defendants in Error.